PUBLIC DEFENDERS vs. ASSIGNED COUNSEL: AN EXPLORATORY ANALYSIS OF THE DEFENSE OF INDIGENTS IN THE LOWER CRIMINAL COURTS OF MASSACHUSETTS

by

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ABSTRACT

Public Defenders vs. Assigned Counsel: An Exploratory Analysis of the Defense of Indigents in the Lower Criminal Courts of Massachusetts

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Submitted to the Department of Urban Studies and Planning on May 28, 1974 in partial fulfillment of the requirements for the degree of Bachelor of Science.

The United States Constitution mandates that all persons charged with crimes punishable by imprisonment are entitled to legal counsel for their defense. Since the beginning of the twentieth century there has been a history of progressively expanding notions of the right to counsel, and at present, defendants in both Federal and State courts who cannot afford their own attorneys must generally be provided with counsel. Two basic methods are used to accomplish this: assigned counsel and public defenders. There is widespread debate about the relative merits of these two systems, but little comparative analysis to support the contentions of either side. This study attempts such an analysis, employing as a case for study the Massachusetts courts, which use both methods for providing counsel for the indigent.

The indigent-defense systems of two courts - one utilizing public defenders, the other employing assigned counsel - were observed to determine what differences, if any, exist in the types of defense provided by the two kinds of lawyers and to identify those variables which bring about the differences. Consistent differences were found in the representation provided. Public defenders were found to employ a wider range of tactics at each stage of the proceedings than the assigned counsel, and not only to seek a finding of not guilty for their clients (as did the assigned counsel) but also to place a strong emphasis on obtaining favorable dispositions for those clients not acquitted. In short, the public defenders were "advocates" for their clients, while assigned counsel merely defended theirs. Important variables in bringing about these differences were frequency of attorneys' interaction with the particular court, group or individual nature of attorneys' practice, and

the personal goals of the attorneys themselves.

"Advocacy" benefits the clients more than does simple "defense." Therefore, the public defender system is judged to be preferable to the assigned counsel system observed. Public defenders could be aided by a reduction in caseload, while assigned counsel could be assisted by changes which would ease their access to information available from the infra-structure of the courts.

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To the Memory of My Father

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INTRODUCTION

The United States Constitution, as currently interpreted by the Supreme Court, mandates the provision of counsel for indigent defendants charged with any offense punishable by a prison sentence. The responsibility for providing counsel, in all but Federal offenses, however, lies with the states. States have chosen to meet this responsibility in differing ways - some through public defender organizations, others through the use of private counsel. Many states provide a complex array of these models.

Such is the case in Massachusetts. In Suffolk County, for example, the Commonwealth-operated Massachusetts Defenders Committee is the prime source of indigent counsel in the Dorchester District Court and the Boston Municipal Court. Systems focusing on the appointment of private counsel, on the other hand, are in effect in the District Courts of Brighton, South Boston, East Boston, Chelsea, and West Roxbury; and the private Roxbury Defenders Committee represents many of the indigent defendants in Roxbury District Court. Defense of indigents in the Suffolk Superior Court is provided by the Massachusetts Defenders Committee, regardless of who represented the defendant in District Court.

Much controversy has surrounded this multiplicity of systems. The sparsely-funded Massachusetts Defenders Committee once served a significantly larger number of courts than at present, but consolidated its services under severe criticism regarding, primarily, attorneys' caseloads. Several courts

relying on private counsel for indigent defense have been charged with cronyism. Law reform groups have attacked both systems as inadequate. However, this controversy has resulted in little comparative analysis.

The right to counsel is one of our fundamental rights, and determination of how best to implement this right deserves careful study. In this paper, I have attempted to present an introductory analysis of the present situation. This analysis, by no means comprehensive or complete, sets out to accomplish three goals. It asks: "What are the important differences with respect to the type of defense provided to indigents in lower criminal courts between public defenders and private appointed counsel?" It further searches for structural differences between the two systems which might create the differences in performance. Finally, on the basis of its analysis of performance differences and their system-related causes, it makes initial conclusions and recommendations for further study.

BACKGROUND

The provision of counsel for indigent criminal defendants is, at present, of particular interest to planners of legal institutions. Over the years, as the courts and legislatures have expanded the scope and extended the applicability of this right, the debate over how best to implement it has soon followed. In order to plan systems to provide this right, this process must be examined. This chapter will trace the legal development of the right to counsel of indigent defendants, summarize the basic methods of providing this service, and survey the literature to identify what is known about the performance of various types of attorneys which can help us to choose the proper method of implementation.

I. The Right to Counsel

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his Defence."

As originally interpreted, this provision was seen not as a guarantee of counsel for all defendants, but, rather, as an assurance that those defendants desiring and able to do so would be able to use counsel in their defense. Support for the thesis that this interpretation was assumed by the framers of the Constitution is drawn by Levenson from the fact that the first Congress, which initiated the Bill of Rights, also passed an Act statutorily providing for assignment of counsel when necessary to defendants in capital cases.[1] If Congress

had believed the Sixth Amendment provided for counsel for those unable to retain their own, she contends, this Act would have been perceived as redundant, and, most likely, not passed.

At that time, however, defense of indigents was not the fiercely debated issue it is today. In fact, the problem was of a much smaller magnitude, since, until the late nineteenth century, the legal profession was much more flexible in its pricing practices than it is today. Lawyers were expected to employ differential pricing of their services. Those who could pay the price were charged high rates; those with less resources were correspondingly charged less. Thus there were few who were unable to obtain counsel when the need arose.

In 1870, the Association of the Bar of the City of New York - the first modern professional legal association - was organized. In the years following, such associations were formed across the nation. It was only a short time before these associations, which quickly became strong, addressed the economics of their profession, and adopted minimum-fee schedules. This concept seems commonplace today, but it was an historic decision to adopt it. "By adopting a minimum-fee schedule - by fixing a formal price of entry - the legal profession defined a group which could not afford services."[2] In other words, it was the establishment of minimum-fee schedules which transformed the defense of indigents from a rather small issue to an important problem.

Not until 1932 did the United States Supreme Court address

the issue of defense counsel for indigents. In the case of Powell v. Alabama,[3] the Court ruled that indigent defendants were entitled to counsel in state capital cases.

This decision was made, as were most state due process cases of that era, on the narrowest possible grounds. The Fourteenth Amendment was employed to justify the decision, but it was not a blanket incorporation of Sixth Amendment rights into those imposed on states by the Fourteenth Amendment. Rather, the court argued that its incorporation was based solely on the fact that the assistance of counsel in state capital cases was so fundamental to our notions of fair treatment and due process that it was inherent in those concepts, and was thus mandated by the due process clause of the Fourteenth Amendment. The Court argued forcefully that counsel was a genuine necessity:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incomplete evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to adequately prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence,

> how much more true is it of the ignorant and illiterate, or those of feeble intellect.[4]

Even with this ruling, the right to appointed counsel was applicable only to a small subset of criminal defendants - those charged with capital crimes. In 1938 the Court extended the right to counsel in Federal cases. In Johnson v. Zerbst,[5] two defendants charged with counterfeiting, a federal non-capital offense, had pleaded not guilty, but were unable to retain counsel and were convicted at a trial in which they defended themselves. The court reversed these convictions, stating:

> The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.[6]

It was thereby established that indigent defendants in all federal felony cases were entitled to appointed counsel.

In 1942, the Court heard the case of Betts v. Brady.[7] Smith Betts, the defendant, had been charged in Maryland with robbery, a state non-capital offense. At his arraignment Betts had stated that he was unable to afford a lawyer and requested that one be assigned to his case. The judge refused the request, but Betts did not waive his right to counsel and pleaded not guilty. At trial, he presented his own defense and was found guilty. The Court found that:

> in the majority of the States, it has been the considered judgment of the people, their representatives, and their courts, that appointment of counsel is not a fundamental right essential to a fair trial.[8]

Thus, the Court, holding to its narrow interpretation of Fourteenth Amendment rights, refused to expand the set of circumstances in which indigent defendants were entitled to appointed counsel. This ruling was to stand for twenty-one years.

In 1963, the Supreme Court overturned its decision in Betts v. Brady. In the case of Gideon v. Wainwright,[9] the Court nullified a Florida court decision convicting Clarence Gideon of breaking and entering with intent to commit a misdemeanor. Gideon had asked the trial judge to appoint a lawyer for him, since he could not afford counsel, but the judge refused, since Florida law only provided for the appointment of counsel in capital cases. Gideon then pleaded not guilty, and, refusing to waive his right to counsel, conducted his own defense.

By 1963, many states, either by law or court rule, had provided for the appointment of counsel for indigents in non-capital cases. Most of these states, twenty-two in all, filed amicus curiae briefs urging the Supreme Court to overrule its Betts decision. In overturning Gideon's conviction and remanding the case for retrial with appointed counsel, the Court concluded:

> ...The fact is that in deciding as it did - that "appointment of counsel is not a fundamental right, essential to a fair trial" - the Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional

> principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.[10]

The impact of Gideon was enormous. There are thousands of felony trials in every state each year, and a large percentage of the defendants in these cases are indigent. Indigent-defense programs were inundated with cases, and new methods had to be devised for providing counsel.

The need for defense attorneys for the indigent was increased even more in 1972, with the case of Argersinger v. Hamlin.[11] In Argersinger the Court ruled that indigent defendants charged with crimes punishable by imprisonment, whether felony or misdeameanor, are entitled to appointed counsel. The Court in its ruling, stated that:

> The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy.[12]

Thus, beginning in 1972, one hundred and eighty-one years after the ratification of the Sixth Amendment, no one in the United States of America would lose his liberty without the benefit of a trial with representation by legal counsel.

These decisions have placed a weighty responsibility on the states. In 1965, 314,000 defendants were charged with felonies alone in state courts.[13] The number of defendants charged with misdemeanors was, most likely, far greater. The states have chosen a variety of methods to meet this responsibility.

Too basic methods are used: salaried defenders and assigned counsel. There are three main variations of the defender method. In public defender systems, the most common of the three, salaried lawyers, paid by governmental (state or local) funds, devote their time to the specialized practice of defending indigents. Private defender systems are run in a similar manner to the public defender systems, but are funded by private organizations such as Legal Aid Societies or other non-profit organizations. The third type of defender system is a public-private system, funded by both private agencies and the state or local government, most often administered by a non-government board of trustees.

In assigned counsel systems, lawyers in private practice are appointed to represent indigents on a case by case basis. These attorneys are compensated by the state or municipality or, sometimes, the court itself. In some locations these lawyers serve without fee. There tends to be little effort to coordinate the efforts of these individual attorneys.

The Commonwealth of Massachusetts uses both methods to meet its reponsibility to provide defense for indigents. In

some courts, an assigned counsel system is used. In other, primarily urban, courts, defense of indigents is handled by the Massachusetts Defenders Committee (MDC), which was established by the state legislature in 1960 to be the primary resource for defense of indigents.

The existence of both systems within one state court organization provides several important advantages for students of the defense of indigents. First, the relative merits of salaried defenders and appointed counsel are sharply debated within the Commonwealth's legal community. Supporters of salaried defenders point to the greater efficiency and effectiveness of an organized group of attorneys specializing in criminal defense, and the tendency of defenders to pursue the defense of their clients' interests in broadly defined ways. Advocates of the appointed counsel system, on the other hand, point out that wider involvement of the bar in indigent defense provides more experienced counsel and involves more attorneys in the reform of the criminal courts.

A second advantage of having both systems in one court organization is that it allows a comparative analysis of the two systems in roughly comparable settings. This study undertakes to accomplish such an analysis and to draw policy implications from it. The method will be primarily empirical since few prior studies appear to have attempted to address this specific issue.

II. Related Studies

There have been many studies of criminal defense which deal with the actions and motives of the defense attorney. Unfortunately, they provide little evidence with which to evaluate the efficacy of models for providing counsel to the indigent. Predominantly, analysts of the defense process have been interested either in the general role of the lawyer within the courtroom or at best with the difference between "public" and "private" lawyers - ignoring the many possible variations within these two models. Within this group of studies I have concentrated on identifying those which identify some of the variables relevant to the lawyer's preparation for the defense; these deal mostly with plea bargaining. Second, I have reviewed those few which point to possible behavioral or structural differences between public and private counsel.

The American Bar Association views pre-trial investigation and preparation as essential to the "effective and fair administration of criminal justice."[14] Their conception of this process, similar to most traditional analyses, is that "It is the duty of the lawyer to conduct a prompt investigation of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty."[15] One particular method of investigation and preparation which should be attempted, they add, is "to secure information in the possession of the prosecution and law enforcement authorities."[16]

Most empirical studies which look at the defense process,

however, are particularly interested not in this general process of preparation, but in examining the relationships between defense attorneys and the prosecutors. Very likely this interest is a result of the discrepancy between these interactions and the popular conception of the adversary systems. Most observers point out that some defenders and prosecutors, though they may be at opposite ends of the theoretical adversary system, do communicate and, in fact, cooperate with each other to a significant extent. This unofficial contact can range in subject from calendar adjustments to plea and sentence bargaining. A good example of the former is provided by David Sudnow, who points out that although the more formal method of requesting a continuance involves a request to the judge, who then asks the prosecutor, often such continuances are agreed upon in informal friendly chatting between a defender and prosecutor who are well known to each other and are brought before the judge only for formal approval.[17]

Plea and sentence bargaining are thought to most typically involve a pre-trial agreement by the defense attorney to convince his client to plead guilty to one or more charges in exchange for the dropping of other charges or a recommendation by the prosecutor of a lenient disposition. Often, the charge(s) to which the defendant pleads guilty are not those originally brought against him, but have been lowered. Researchers who have observed this phenomenon believe that the practice is pervasive and results in an extremely high percentage

of cases never going to trial on merits.

A critical issue then is to what extent this kind of bargaining occurs among lawyers for the indigent, and whether indeed it affects the quality of representation. Observers disagree, too, on whether bargaining is practiced differently among public and private counsel. Sudnow, for example, posits that the private attorney is a pure advocate for his client, untarnished by extra-mural contact with the prosecutors, while implying that the interests of the public defender are enmeshed with those of the prosecution:

> While the courtroom encounters of private attorneys are brief, businesslike, and circumscribed, interactionally and temporally, by the particular cases that bring them there, the P.D. ... conveys in his demeanor his place as a member of [the court's] core personnel.[18]

> While the central focus of the private attorney's attention is his client, the courtroom and affairs of court constitute the locus of involvements for the P.D.[19]

Skolnick, however, sees no difference in the bargaining practices of public and private attorneys. Instead, he believes that it is cooperativeness which enables either type of attorney to bargain:

> To the prosecutor, it matters not so much whether a defendant is being represented by a P.D. as whether the defense attorney, regardless of his institutional base, can be counted upon as a "cooperative" defense attorney, a category that usually includes leading private defense attorneys and only some members of the P.D.'s office.[20]

He then goes on to give an example of a "cooperative" private attorney as one who maintains good relationships with the prosecutor's office:

> "You have to know the law to practice criminal law, but

> you also have to know the ropes. Our office is on very good terms with the prosecutor's office, because they trust us. We never misrepresent to them, and we don't degrade them, or the police or their witnesses. ... When we settle cases, we get a reduction of the original charge in virtually every case. ..." [21]

To Blumberg, however, the critical variable is not cooperativeness, but the amount of time spent in court. He divided defense lawyers into two categories: "'lawyer regulars', i.e., those defense lawyers, who by virtue of their appearances in behalf of defendants, tend to represent the bulk of a criminal court's ... workload, and those lawyers who are not 'regulars,' who appear almost casually on behalf of an occasional client."[22] He goes on to point out that, for "regulars," the contacts built up are the actual cornerstone of their practice:

> ["Lawyer regulars" do not] conceal the necessity for maintaining intimate relations with all levels of personnel in the court setting... These informal relations are the sine qua non not only of retaining a practice, but also in the negotiation of pleas and sentences.[23]

The implications for the defendant of this kind of negotiation are widely disputed. Some observers believe that, on the average, clients of attorneys utilizing this tactic receive lighter dispositions, others point to the violations of due process this practice might represent. Many critiques, for example, suggest that bargaining tends to presuppose the guilt of the defendant:

> [Bargaining] presupposes the guilt of the client, as a general matter, and the fact that pleas of guilty are so common tends to reinforce the presumption of guilt throughout the system. It is a theory that stresses administrative regularity over challenge. ...[24]

> [T]he way defendants are represented..., the way trials are conducted, ... - all of the P.D.'s work is premised on the supposition that people charged with crimes have committed crimes.[25]

> All notions of the presumption of innocence are completely alien ...[26]

Similarly, other observers have stated that bargaining dangerously lessens the adversary nature of criminal proceedings and that its widespread use tends to produce Soviet-type trials, which are, for all practical purposes, appeals from pre-trial preparation.

Even this fairly sparse literature indicates, then, a number of issues which need to be explored in evaluating methods of providing counsel to the indigent. These studies specifically lead one to ask:

- Are plea and sentence bargaining pervasive?
- Are these types of bargaining beneficial to defendants?

In addition, their analyses hint at a number of broader questions:

- Does frequency of court attendance affect lawyers' methods of defense?
- Do public defenders perform differently than private defense attorneys?
- What brings about close relations between prosecutors and defenders?

NOTES

[1]1 Stat., 112, 118 (1790).

[2]F. Raymond Marks, with Kirk Leswing and Barbara A. Fortinsky, The Lawyer, the Public, and Professional Responsibility (Chicago: American Bar Foundation, 1972) pp. 16-17.

[3]287U.S.45(1932).

[4]Ibid., p. 69.

[5]304U.S.458(1938).

[6]Ibid., p. 463.

[7]316U.S.455(1942).

[8]Ibid., p. 471.

[9]372U.S.335(1963).

[10]Ibid., pp. 343-344.

[11]407U.S.25(1972).

[12]Ibid., p. 40.

[13]President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, p. 55, cited in Argersinger v. Hamlin, 407U.S.25,33(1972).

[14]American Bar Association Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function (New York: Institute of Judicial Administration, 1970), p. 225.

[15]Ibid.

[16]Ibid., pp. 225-226.

[17]David Sudnow, "Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office," Social Problems, XII, Number 3 (Winter, 1965), p. 265.

[18]Ibid., p. 264.

[19]Ibid., p. 265.

[20]Jerome H. Skolnick, "In Defense of Public Defenders," Society and the Legal Order, ed. Jerome H. Skolnick and Richard D. Schwartz (New York: Basic Books, Inc., 1970), pp. 415-416.

[21] Ibid., p. 416.

[22] Abraham S. Blumberg, "The Practice of Law as a Confidence Game," Law and Society Review, I, Number 2, (June, 1967), p. 20.

[23] Ibid., p. 21.

[24] Skolnick, loc. cit., p. 417.

[25] Sudnow, loc. cit., p. 269.

[26] Abraham S. Blumberg, "Lawyers with Convictions," The Scales of Justice, ed. Abraham S. Blumberg (Trans-action Books, 1970).

METHODOLOGY

I. The Questions

Though there has been controversy over types of appointed counsel and their relative efficacy, there is little useful existing material on the subject. Specifically, there has been little empirical study of counsel at work, and even less explicitly comparing public defenders with private appointed counsel. In addition, there are no certain standards by which to measure quality of legal representation.

In light of these deficiencies, I set out to accomplish the following:

(1) Collect empirical data concerning defense of indigents.

(2) Perform an explanatory analysis comparing public defenders and private counsel.

(3) Identify critical variables and develop useful criteria for further efforts to evaluate defense strategies.

I attempted to address these issues by comparing the indigent-defense systems in two District Courts - one using the Massachusetts Defenders Committee and the other a private counsel system. Results, although specific to the two courts, would have applicability to similar systems.

This comparison was designed to answer two questions:

(1) What, if any, are the differences in the type of representation received by indigents in the two courts?

(2) What structural elements of the particular indigent defense systems bring about these differences?

The first question addresses the behavior of the appointed defense counsel. In particular it focuses on describing the attorneys' actions in court and their preparations of the defense. In addition, I have made an attempt to examine the attitudes of these lawyers toward the work and their clients and to observe their "reward" system.

The study does not address differences in the findings and/or dispositions obtained by the two types of defense counsel. There are two basic reasons for this. First, in a study of less than enormous magnitude too few cases are observed, if necessary variables are controlled, to obtain any significant results. Second, information and statistics emanating from the criminal justice system are notoriously artificial. Many factors, including, for example, intra-city variations in standards for an "arrestable" offense and political pressures on prosecution actors, conspire to render such information nearly useless.[1]

The second major question I am addressing seeks explanations for any differences noted between private and public counsel.

There appear to be four main structural differences between the two groups that might account for variations in their behavior: the public/private issue, group or individual practice, frequency of attendance at the court, and method of payment.

The most obvious, of course, is the public/private dichotomy. Attorneys for the Massachusetts Defenders Committee are employees of the Commonwealth of Massachusetts, while private defense counsel are, obviously, members of the private sector. In the courtroom, the public defender, a state employee, is charged with defending his client against the accusations of the prosecutor, another state employee, with the goal of convincing the judge, a third state employee. All the actors are working for the same producer! The private defense attorney, on the other hand, is working for himself (or his firm). The critical question is whether close affiliation with the State alters the way in which the public attorney approaches the defense.

The second structural difference that may be significant deals with the attorney's work organization. In each court served by the Massachusetts Defenders Committee, there are several Defenders. Although they are assigned to cases individually, the group interacts extensively. The private defense attorneys, on the other hand, are primarily loners. Does contact with colleagues change defense attorneys' behavior?

A third contrast between the systems involves familiarity with the court. Massachusetts Defenders Committee attorneys are present daily in the particular court to which they are assigned. This constant contact with court and the various personnel included in not shared by the private defender, who makes his living elsewhere. Does close contact with the court

affect attorneys' defense efforts?

The fourth difference concerns methods of remuneration. The public defenders are salaried employees of the Commonwealth. Their salaries do not depend on the number or type of cases handled. Private defenders, though, are compensated on a per case basis. Do economic considerations play a role in defense methods?

II. The Measures

This research, then, is two-fold. I have attempted to perform both a positive analysis (What do the attorneys do? How does job structure affect their actions?) and a normative analysis (Based on the positive analysis, which system is preferable? Why?). To carry out these analyses, measures of attorneys' behavior are needed. These measures will indicate what an attorney does at each stage of the defense (for the positive analysis) and, a bit more subjectively, the degree of involvement at each stage.

There are several points in the justice system where defense counsel potentially have a significant impact. These points, or "indicators," can be divided into two categories - those concerning courtroom actions ("courtroom indicators") and those concerning the preparation for courtroom actions ("preparation indicators"). The courtroom indicators contribute primarily to the positive analysis, while the preparation indicators are more normative. However, there is no clear

distinction between the two. Courtroom indicators were identified as follows:

- At what stage of the proceedings was the attorney appointed? Was he present?
- Was the defendant's trial attorney present for bail hearing?
- What tactics did the attorney use at the bail hearing?
- Did the attorney file any pre-trial motions? On what basis?
- At trial, did the attorney cross-examine prosecution witnesses? For what purpose?
- Did the attorney file any motions after conclusion of the prosecution's case?
- Were any defense witnesses presented?
- Was the defendant called to testify in his own behalf? For what purpose?
- Did the attorney make a closing statement?
- Was the attorney heard on disposition? What type of argument was used?

The preparation indicators are more subtle. They do not primarily measure <u>what</u> was done, but, rather, attempt to identify <u>how</u> it was done. To describe such a process in terms of discrete stages, however, requires some arbitrary decisions. Thus, these preparation indicators are, to an extent, less objective than the courtroom indicators:

- Did the attorney conduct a bail interview with the client? What types of information were collected?
- Did the defendant have a pre-trial interview with his attorney? What types of information were collected? For what purposes?
- Did the attorney seek information from other sources? Which sources? What types of information? For what purposes?
- Was investigation employed? What information was sought?
- How did the information gathered affect trial tactics?

- How much time was spent preparing the case?
- Was there further pre-trial contact between attorney and client?
- Were any "bargains" struck with the prosecution? What type? Under what circumstances?

In choosing these indicators, a number of implicit assumptions have been made:

(1) The trial is only one of several determinants of defense-type.

(2) Information is a key factor in conducting an effective defense.

(3) The eventual finding of guilt or innocence does not end the defense effort. Disposition is very important.

(4) The degree of attorney involvement at each stage of the defense process affects the eventual outcome.

III. The Methods

In order to best answer the questions posed in this study, it was necessary to obtain primary data. Few primary sources exist in this field, and none contain exactly what was needed. Thus, to obtain the needed information, first-hand observation was required. Observation of at least two courts was necessary, since no court uses a dual system and examples of both types of indigent-defense systems were needed.

Thus, in order to gather the needed data, two or more courts in which the observations would take place had to be chosen. Important factors in choosing the courts were ease of access, sufficiency of caseload for observational purposes, and the representativeness of the particular type (public or private) of indigent-defense system in use.

Ease of access to the courts dictated that I remain within Suffolk County. Within that area only two courts use public defenders - the Municipal Court of the Dorchester District [Dorchester District Court] and the Boston Municipal Court.[2] The criminal caseload is both of these courts is high.[3] However, the range of crimes represented in the Boston Municipal Court is greater than in the Dorchester District Court. Therefore, the Boston Municipal Court was chosen as the primary site of observations concerning representation provided by attorneys of the Massachusetts Defenders Committee. In addition, I had had some previous experience in the Dorchester District Court, where I made many observations (some of which appear in the "Case Studies" chapter). These observations served as a check of the representative nature of MDC behavior in the Boston Municipal Court.

A court in which to observe a system of appointed private defense counsel was also necessary. Suffolk County courts of this nature are the Municipal Court of the Brighton District, Municipal Court of the South Boston District, Municipal Court of the West Roxbury District, Municipal Court of the Charlestown District, the East Boston District Court, and the Chelsea District Court. A main criterion in choosing a "target court" from this list was the court's caseload. It was felt that the court observed should process a sufficiently large number of criminal cases to enable enough observations to be made in a reasonably short period of time. In applying this criterion, only non-automobile cases were considered, since the defense

of auto cases seems on the whole to be very routine in all courts]. Another criterion was the particular system of appointing private counsel for indigents used by the court. The intent was to observe in operation a private-defender system which appeared to be especially conducive to effective representation, and thus could more meaningfully be compared to public defender systems.

In this respect (and in terms of caseload[4]), the principal Court of the West Roxbury District [West Roxbury District Court] seemed to best represent courts with systems of private counsel. In the West Roxbury District Court, attorneys are appointed for indigent criminal defendants from a list maintained by the court's probation department. The list contains the names of approximately 150 Boston-area attorneys who have asked to be considered for appointment. Attorneys are chosen from this list on the basis of a rotation. As a result, they share the indigent caseload equally - each receiving about nine cases per year. Counsel are compensated not, as in some courts, by the hour, or, as in others, on different scales for different types of cases, but on a flat rate of seventy-five dollars per incident (i.e., if five complaints involving two co-defendants arise from one incident, the attorney representing these defendants still receives $75.).

The process of data collection in Boston Municipal Court and the West Roxbury District Court lasted eight weeks. [Data from the Dorchester District Court had been collected in the

summer of 1973.] Four weeks were spent in each court. The first week was devoted to acclimatization to the particular court and general observations of court operations. Data was then formally collected for the following three weeks

Within the courts, observations were made in three categories - courthouse activities, client interviews, and investigation and other preparation for trial.

Observation of courthouse activities included both courtroom occurrences, such as trial, bail hearing, etc., and events occurring outside the courtroom, such as person-to-person contacts among various actors in the system. Included in this category of observations are all of the courtroom indicators and some of the preparation indicators.

In both courts, observation of courtroom activities followed the same format. I took rather complete notes of each proceeding involving an indigent defendant - arraignment, bail hearing, trial, and disposition hearing. In recording these proceedings, particular attention was paid to those aspects singled out as "indicators." In addition, "census data" (race, sex, estimated age) was recorded for each indigent defendant so that it could be ascertained whether the court populations were, in fact, comparable.

Activities occurring outside the courtroom were observed in two ways. Occasionally, with his or her consent, I followed an attorney through his daily routine at court. More often,

I played the role of a gadabout, wandering from attorney to attorney, observing as much as possible of each attorney's actions. Each method had discernible advantages. By continuously following one attorney over the course of a day, it was easier to gain a sense of the total spectrum of activities engaged in by a defense counsel. Being a "gadabout," however, gave me more data, since I was free to "go where the action is." Also, I believed that an attorney would be less likely to react to the presence of a sporadic observer by (intentionally or unintentailly) modifying his behavior.

My observations of client interviews were necessarily more limited. I was able to observe client interviews conducted by attorneys of the Massachusetts Defenders Committee at the MDC office with the permission of the attorney involved. Once again, I took voluminous notes, with specific concentration on indicators of preparation methods.

First-hand observations with respect to the use of investigation and other trial preparation by the attorneys in Dorchester District Court and the Boston Municipal Court were also made. Observations of the use of investigation examined primarily the decision to investigate and the results of investigation. The decision to investigate involved both the determination that more information was needed for a particular aspect of a case and the decision of how best to obtain this information. On a few occasions, the investigation itself was observed. Observation of other types of trial preparation

took place primarily on an ad hoc basis. When the use of such tactics (e.g., consultation with other attorneys) was noticed, it was recorded.

In contrast, direct observations of the use of interviews, investigations, and other trial preparation by appointed counsel in West Roxbury District Court were not possible. Each attorney appears only infrequently in the Court and devotes most of his time to private practice. Therefore, there was no opportunity to become well-enough acquainted with these attorneys to be permitted to observe them outside of the Court itself. Thus, I was able to study these forms of trial preparation only through interviews with these attorneys.

There is, of course, the possibility that the accounts of these activities provided by the attorneys were molded by the desire to present their actions in a particular light. This possibility is minimized, however, by the fact that these attorneys were not informed of the exact reasons for the observations, but, rather, were told that the observer was "interested in the defense of indigents."

In addition to my observations of the actions of defense counsel for the indigent, interviews of both types of lawyers were conducted. These interviews were designed to be informal and open-ended in nature, with the hope that these attorneys would "speak their minds" and thus give a picture of themselves. My purpose in including this technique was to obtain information

about the attorney's methods and motives which could not be discovered by observation alone.

IV. Methodological Considerations

While it appears to best suit my purposes, the research methodology I have chosen is not without its problems. The relatively short time spent observing leaves the possibility that the cases observed were not representative of the overall caseload. In addition, my interpretations of the data collected are subjective and could, possibly, be disputed by another observer. Also, my choice of illustrating cases in the Case Studies section is arbitrary and, conceivably, might not truly represent the range of my observations.

A caveat is in order concerning the applicability of my results. I cannot guarantee that the courts chosen for this study are truly representative of their respective indigent-defense systems. Perhaps there are no "representative" courts. In light of this, the generalizability of my findings should not be overstated.

However, despite these deficiencies, a number of useful contributions can be made by this effort. This study is exploratory in nature and will more finely stake out the problem area for future studies. It will identify variables for measuring the defense effort and suggest critical variables of job structure. In addition, it will provide a sense of the models of defense used by different kinds of counsel.

NOTES

[1]For a more complete discussion of this issue, see Leonard G. Buckle and Suzann Thomas Buckle, "Bargaining for Justice: Plea Bargaining as Reform in the Criminal Courts" (unpublished Doctoral dissertation, Department of Urban Studies and Planning, Massachusetts Institute of Technology, 1974).

[2]The Boston Municipal Court is administratively separate from the Massachusetts District Courts. However, its jurisdiction over criminal matters is the same as that of the District Courts. For the purposes of this study, the administrative separation is inconsequential.

[3]Dorchester District Court, 22,266 criminal cases begun in the year ending June 30, 1969. Statistics of the District Courts of Massachusetts for the Year Ending June 30, 1969. Boston Municipal Court 18,438 criminal cases begun in 1973. Telephone conversation, Criminal Clerk of Boston Municipal Court, May 10, 1974.

[4]10,272 criminal cases begun in the year ending June 30, 1969. Statistics of the District Courts ..., loc. cit.

CASE STUDIES

I. The Massachusetts Defenders Committee

Observations regarding the representation provided by attorneys of the Massachusetts Defenders Committee were made primarily in the Boston Municipal Court, with some from the Dorchester District Court. These observations, reflecting the activities of the Defenders from arraignment to disposition, yield a wealth of information regarding the type of representation received by indigent defendants in the two courts. These observations indicate that, despite their heavy caseload, MDC attorneys conduct an aggressive and complete defense for each of their clients.

Arraignment: The arraignment proceeding is the defendant's official entry into the court system. In this proceeding the defendant learns who has brought complaints against him, and the nature of these complaints. The Massachusetts Defenders, because they are stationed at the court, are at least practically able to commence their service at this stage. However, each Defender performs a myriad of activities at court, and arraignments, because of their relatively predictable nature, rank low in priority in their minds. Thus, although the arraignments are an important proceeding for the defendant, they are often treated informally by the busy Defender. A typical arraignment might be handled as was the following example:

A name was called, and a male defendant, appeared in

the dock. Two of the three public defenders in the courtroom began to pay attention, as nearly half of all defendants who are arraigned while in custody are given public defenders. The clerk then read the charges - breaking and entering in the night with intent to commit a felony, to wit: larceny.

Judge: You have the right to plead not guilty. Do you plead not guilty?

Defendant: Yes.

J: Can you get your own lawyer?

D: Can't afford it.

J: What do you do for a living?

D: Laborer.

J: What do you make a week?

D: Eighty bucks.

J: I'm appointing the Massachusetts Defenders Committee to represent you. Sit down and your lawyer will see you in a few minutes.

Each public defender, upon hearing the words "Massachusetts Defenders Committee," stood up to file an appearance slip and then, seeing the others standing, sat down. Then they tried again. Finally, they agreed among themselves (without a word being spoken) and one public defender filed an appearance slip and went to the dock to speak with his new client.

Despite this casualness with which the Defender's treat the arraignment "ceremony" itself, often, discovery of the facts of a particular case can begin at the arraignment, depending on the inclination of the judge to combine an informal bail hearing with the arraignment proceedings. Thus,

although they treat arraignments relatively informally, the Massachusetts Defenders must be present and alert for them. By learning a bit of the government's case this early in the defendant's journey through the court system, the attorney is getting a step ahead of the game. One arraignment of this sort was the following:

A name was called, and the defendant appeared in the back of the courtroom walking toward the Defendant's Stand. His dress gave the appearance of indigency. Anticipating that the MDC would be assigned to the defense, the one MDC attorney in the courtroom listened as the charge was read, "disorderly conduct." As in the example above, the judge determined indigency and appointed the Massachusetts Defenders Committee. The judge then asked the complainant, a Boston policeman, to tell what happened.

At this point, the judge had transformed the proceeding from an arraignment to a bail hearing. The policeman and other actors in the court had to reveal facts relevant to bail and, in that process, gave the Defenders a grounding in the case. The policeman, for example, described a shouting match outside a tavern between the defendant and another male. The policeman, who happened to be driving by, stopped and asked them to keep the noise down. The other male quieted down, but the defendant allegedly kept shouting. The policeman warned the defendant, but when he wouldn't quiet down, the policeman arrested him.

After the policeman finished his story, the Massachusetts Defender asked him if he had received a radio call about the incident and if the defendant resisted arrest. Both answers were no.

Following the policeman's story, the judge then made the formal bail decision. As is typical in cases of this type, the defendant had no prior record and was allowed to go on personal recognizance. Having announced this, the judge asked counsel when they would like to try the case and they agreed on a two week continuance. The defendant left and, a few moments later, the public defender went out to see his new client.

Even in this perfunctory hearing, the defender collected useful information. From the policeman's testimony, the defender learned the Commonwealth's basic case and was made aware of the existence of a witness who should be interviewed. Information received early in the attorney's representation of a defendant, as in this case, enables him to conduct a better interview of the defendant and to mount an effective investigation.

Bail Interview: If at the time of arraignment, the judge decides to hold the defendant for a bail hearing, the Massachusetts Defender is given a chance to interview his new client. These interviews are necessarily brief, and to the point. The Massachusetts Defenders attempt not only to learn the defendant's record and the basic facts of the case, but

also to learn other facts about the defendant which could indicate his or her likelihood to appear for trial (e.g., family ties, job, etc.). Though these meetings were brief, all bail interviews I observed were conducted with extreme civility and a high degree of respect for the defendant. In each one, for example, the defendants were always addressed as Mr. X, or Ms. Y.

One case went as follows: The defendant was charged with assault on a police officer with a dangerous weapon, to wit: a pistol. The attorney introduced himself and immediately began asking questions to fill out MDC's standard face sheet. The face sheet consists mostly of census-type information - name, address, phone, date of birth, race, sex, occupation, military service, religion, family data, etc. The defendant answered all the questions politely but seemed skeptical about what help knowing such things as his religion would give the attorney in his attempts to help the defendant.

After completing the face sheet, the attorney took out a pad of paper and asked the defendant what happened. The defendant explained that he had been carrying his gun (for which had has a permit) in his pocket as he was leaving Park Street Station. While walking up the stairs, he was jostled by a passerby. Then, he claimed, he reached into his pocket and took out the gun to make sure it was still there. Immediately, a Boston policeman grabbed him and arrested him.

The public defender recorded this information without comment, and was ready almost immediately afterwards with more questions:

Attorney: Have you been arrested before?

Defendant: Yeah, I was arrested a few times for disorderly conduct.

A: When?

D: I don't remember exactly - it was over ten years ago.

A: Were you found guilty?

D: I think so.

A: Did you ever default during those cases?

D: No. Say, how much bail is he gonna put on me?

A: It's hard to predict.

During this rather brief interview, the Defender was trying to accomplish a number of objectives related to preparation of the case. By collecting the face sheet information, the attorney gained information (such as the defendant's family ties and length of residence in Boston) which will assist him in the bail hearing and, if necessary, in disposition arguments. The defendant's version of his arrest is also useful. Not only is it the attorney's introduction to the facts of the case, but by comparing his client's version of the incident with the Commonwealth's, he possibly will gain insights into his client's veracity and the conflicts which might arise at trial.

Thus, when a few minutes after the interview, the attorney saw the arresting policeman in the corridor, he asked the policeman what had happened. The policeman said that he was

coming out through a turnstyle when he saw the defendant on the stairs crouched in a firing position, taking aim at an MBTA policeman who was also in the area. The Boston policeman shouted a warning to the MBTA policeman, pulled out his gun, and began to chase the defendant. The defendant put the gun in his pocket and started to run, but was tackled by the policeman.

The conversation was able to occur because the policeman, who had been in court several times previously, knew the public defender by name and thus gave this information willingly. The defender perceived the importance of contacts with the police since "most police tell you what you need to know once you get to know them." He said that such a large discrepancy between the defendant's and the policeman's story is common, but that the policeman's story tends to be believed. Especially because of the strength of the policeman's testimony, then, in order to be completely prepared, it was necessary to anticipate the prosecution's story. By utilizing his acquaintance with prosecution actors, he was able to get this information.

Bail Hearing: For the defendant, the decision as to whether bail is to be granted is critical for a number of reasons. First, the defendants in Suffolk County who are unable to raise bail may spend an average of three weeks in the Suffolk County Jail. Incarceration in any jail is very unpleasant, to say the least, and the Suffolk County Jail is

not "any jail." Over one hundred years old, this dank rat and roach infested building has been ordered by a Federal Court to be closed by 1976, on the grounds that incarceration there is cruel and unusual punishment, especially for presumptively innocent people.

In many cases, the defendant has another compelling reason to avoid pre-trial incarceration - the need to locate witnesses. Often when arrests are made in public or semi-public locations (e.g., a bar), there are several witnesses to the incident who are not known by name, and recognized vaguely, if at all, by the defendant. A non-incarcerated defendant can track down these witnesses, so that they may testify in his defense at trial. However, an incarcerated defendant has virtually no means of finding these critical witnesses.

Recognizing the importance of avoiding incarceration at this state, the defenders work for no or low bail for their clients and thus, to secure their pre-trial release, they use both "legal" and "extra-legal" tactics. The Massachusetts Bail Reform Act dictates the the prime consideration in determination of bail be the likelihood of the defendant to appear at trial. Such characteristics as length of residence in area, employment record, and family ties are to be given important consideration in addition to the client's previous record (if any) of defaults and/or appearances. In most cases, the Massachusetts Defenders stated their appeal for low bail in terms of these considerations.

In the case of the man charged with assaulting the police officer with a pistol, the hearing went as follows:

> **Attorney:** Your honor, the defendant is forty-five years old, and has lived in Boston all his life. He has been arrested before - twice for disorderly conduct in the early sixties - but he never defaulted. He has been working for the same company for eleven years. This man would have nothing to gain by defaulting. Your honor, I believe that this man should be released on personal recognizance.
>
> **D.A.:** Your honor, the severity of the offense is such, that for the protection of the people of the Commonwealth, I would ask that you set bail of $25,000.

The attorney, in this hearing, used a strictly "legal" strategy. The argument was that the defendant was very likely to appear for trial and, therefore, according to the bail laws, he should be released on personal recognizance.

In some cases in which the client is "ill" or otherwise disadvantaged the Defender bases his argument on factors not legally defined as determinants of bail. Such an "extra-legal" argument was the following, in behalf of a client charged with breaking and entering.

> **Attorney:** Your honor, the defendant before you is not a criminal - he is an addict. He has been addicted to heroin for several months. Having him go cold turkey in Charles Street [the Suffolk County Jail] is going to benefit neither him or the Commonwealth. If you release this man on personal recognizance, I will see to it that he enrolls today in a drug treatment program.

In making this argument, the attorney did not even

mention factors which might convince the judge that the defendant would not default. Rather, by emphasizing his client's drug addition, he attempted to evince sympathy for the defendant's plight, hoping that this would influence the judge to release the defendant on personal bond.

In summary, then, the Massachusetts Defenders place great importance on avoiding pre-trial incarceration of their clients. To achieve this end, they use not only strictly "legal" arguments, but any tactics which might influence the judge favorably.

The Interview: At the time of appointment to a case, the Massachusetts Defender sets up an appointment for the defendant to appear at the MDC office. At that time, the Defender fills in the face sheet (if it has not already been done at the court) and then interviews the defendant about the circumstances of his or her arrest.

In order to best enable attorneys other than the interviewer to learn the facts of a case, the Massachusetts Defenders have instituted a standard interview format. This format, pertaining not only to what questions are asked, but also to the order in which they are written up, insures that all necessary information to represent the defendant is collected and easily found. There are two reasons why other attorneys may need this information. First, if the case advances to Superior Court (i.e., if probable cause is found, or if the

case is appealed), most likely a different attorney will handle it there. Also, shifts in personnel occasionally make it necessary for a Defender other than the one first assigned to a particular case to assume responsibility for it before trial.

The interviews are divided into three parts. First, an account of the arrest itself: When? Where? By whom? What was the defendant told? Was he or she questioned? Was he or she searched? Was he or she informed of constitutional rights? Second, an account of what happened to the defendant while in custody. Where was he or she taken? By what means? Was he or she informed of his his or her rights? Questioned? About what? Allowed phone call? Fingerprinted? Photographed? Searched? Was the defendant released on bail or was he or she kept in custody until arraignment? These two parts, of little import in many cases, can, however, establish procedural grounds for dismissal.

Third, and most important, the attorney must ask the defendant for as complete a description as possible of the incident leading to the arrest. Here the format is less formal and the attorney would subtly direct the description, while letting the defendant do as much of the talking as possible. The attorney would usually question the defendant closely on what appeared to be hazy or improbable aspects of his or her story. If the attorney allowed a seemingly unlikely story to be told in court, he would be leaving himself open to large holes being poked in the defense. Such occurrences make it

difficult to get a good disposition, should the judge rule that the facts are sufficient to warrant a finding of guilty.

In the course of this description of the incident, the attorney would also obtain names, addresses, and phone numbers of potential defense witnesses. This is done so that in the course of preparation for the case, he, or an investigator could interview these witnesses if necessary. In addition, the public defender is often able to learn from the prosecution the names of their likely witnesses. Often the defender (or an investigator) will interview these witnesses as well. A final function of the interview is to coach the defendant for his or her appearance in court. The attorney gives the defendant directions concerning when to come to court, what to wear, and what supporting materials to bring (e.g., driver's license, gun permit, cancelled check, etc.). Often this is the last contact between attorney and client before trial.

The way in which the attorney actually conducts the interview of course, depends on the circumstances of the case. Some interviews focus on the facts necessary for an aggressive defense to show either the innocence of the defendant or the presence of mitigating circumstances in his actions. Others primarily seek information which, although not exculpatory, will make a favorable disposition likely. A few interviews emphasize possible procedural errors on the part of the Commonwealth and, thus, indirectly aim for a finding of not guilty. The three interviews that follow exemplify each of these types.

An interview which illustrates an emphasis on an aggressive defense is that which occurred in the case of a defendant charged with possession of a firearm without a permit. Since the face sheet had previously been filled in for this defendant, the attorney began the interview by asking about the arrest. The defendant responded that he had been in the back seat of a car driving to a methadone center when a police car motioned for them to pull over. As the driver pulled over, the defendant said he slipped a cigarette case containing a tiny pistol under the seat. When a policeman came up to the car window and told the defendant to pick up whatever he put under the seat and hand it to him, the defendant complied.

According to the defendant it was at this point that arrest took place. The policeman asked the defendant for his gun permit and when the defendant said he didn't have one the policeman, according to the defendant, then answered that the defendant was under arrest and asked everyone to get out of the car. The defendant said that the policeman frisked him, took a quick look in the car, and then handcuffed him and placed him in a patrol car. The defendant stated that he was informed of his rights in the patrol car.

For the attorney a very critical stage of the interview is discovery of how the defendant was treated at the station house. "What happened at the police station?" the attorney asked the defendant. The defendant stated that once he arrived at the station house, he was booked, informed again

of his rights and placed in a cell. After about an hour, he was taken to police headquarters where he was photographed and fingerprinted. He then was returned to the police station where the bail commissioner released him on personal recognizance. The attorney then asked the defendant if he was questioned at all at the police station. He replied that he wasn't.

The interview then entered its third stage, which concentrated on identifying possible mitigating circumstances for the offense and establishing the personal character of the defendant and the reliability of his story. In this case - and in most others - the defender accomplished this by asking about events leading up to the arrest. The defendant stated that he was a patient at a methadone clinic and must go there three times a day. He and two other patients were driving to the clinic when they passed a side street on which a brawl was taking place. The defendant thought he saw a friend who was another patient from the clinic involved in the brawl, so he asked the driver to stop. He said that he then walked over to the fight and was able to see that the man he had seen was <u>not</u> his friend. He stayed for a few moments to watch. While he watched, someone shouted "Here come the police!" and everyone started to leave.

At this point the defendant's story began to focus on what was the crux of the incident - his allegedly illegal weapon. The defendant claimed that during the fight someone

tossed a small silvery box on the ground which skidded over to where the defendant was standing. He picked it up and opened it. Seeing it was a gun, he put it in his pocket with the intention of selling it eventually. He walked back to the car and got in. About two blocks later, a police car pulled up and an officer motioned for them to pull over. Since he did not have a gun permit, the defendant knew he'd get into trouble if the gun was found in his possession, so he tried to hide it by stashing it under the seat.

The points that would constitute the critical elements for defense are made clear in what the attorney chose to pursue:

Attorney: Were you involved in the fight in any way?

Defendant: No.

A: Could your friends see you during the whole incident?

D: Yes, I believe so.

A: Why do you think the police asked your car to pull over?

D: Probably someone who lives on the street where the fight was saw me pick up the gun, assumed that I was part of the fight, took down the license number of the car I got into and called the cops.

A: How long have you been a patient at the clinic?

D: Two years.

A: Do you think anyone from the center - employees, that is - could testify about your character?

D: The director would.

A: Can you give me the names, addresses and phone numbers of the guys in the car and the director of the clinic?

D: [Gives names] I'll get you their numbers.

A: Okay. Call my secretary as soon as you get them. Call me if you have any questions. I'll see you in court two weeks from tomorrow.

Clearly the lawyer felt that although the defendant may

have been technically guilty of possession of the firearm without a permit, there was no intent to break the law. By pursuing this point, he was attempting to build a case for a very light disposition, such as a continuance without finding for several months, to be followed by dismissal. It is interesting to note too, that the attorney was ready to prepare a vigorous defense even though he had doubts as to the veracity of the defendant's story. Rather than call his client a liar, the attorney merely asked if there were any corroborating witnesses. Informed that there were, the attorney gained some more confidence in his client's story. Soon after the interview he received the phone numbers of these witnesses and called them up. Each gave an account of the incident which backed up the defendant's account.

For this case, the defendant presented a particularly complete version of the facts of his case which, when corroborated, the attorney could use to obtain a favorable finding or disposition. Not all defendants contribute as much to their defense, however. Often, a client will not admit guilt, but has no information which might exonerate him.

This is illustrated in the case of a woman with no previous record, charged with driving under the influence of intoxicating liquors and driving so as to endanger the lives and safety of the public. The attorney asked the defendant what happened at her arrest. The defendant stated that she was driving along when she saw blue flashing lights in her rear view mirror. She pulled over and stopped. The police

pulled up and a policeman told her to get out of her car. When she did she was informed by the police that she was under arrest for driving to endanger ... . According to her, the policeman then said, "I think you're plastered" and told her to get into the patrol car. In the car the policeman informed the defendant of her rights. She was then taken to the police station. "Did they ask you whether you wanted to take the breath-a-lyzer?" the attorney asked. The defendant responded that she didn't remember.

As is usual in this kind of case the attorney continued to seek procedural grounds on which to build a defense. "What happened at the station?" asked the attorney. The defendant said that they took her name and address and allowed her to call her husband. The defendant's husband came and the police released her on personal bond.

The attorney then began to look for character arguments that might be made or for "holes" in the story. He asked her to tell him about the events leading up to her arrest. She said that she had been at a girlfriend's house and they had had a few beers each. She then left to go home and was driving home when the police stopped her. "Do you know why they charged you with reckless driving? Did you swerve a lot - were you in control of the car?" asked the attorney. The defendant said that as far as she knew she was driving safely, but that she didn't remember the evening very well. The attorney then told the defendant to call him if she had

questions and to show up on the date of her trial.

In the course of this interview, the Defender came to the realization that a finding-oriented defense was not likely to succeed. The only witnesses were policemen, and their word was likely to be believed over the defendant, who couldn't even remember many of the details of her experience. The Defender, afterwards, decided that the appropriate strategy would be to aim for a continuance during which the defendant would enroll in ASAP (the Alcohol Safety Action Project).

Although the "arrest" phase of the interview often is of little value to the defense effort, there are instances in which information gained during this phase is of great importance. This occurs primarily when there have been procedural errors in the arrest process. The following case illustrates this third type of interview.

The defendant was a nineteen year old male, charged with disorderly conduct and possession of marijuana. The attorney filled out a face sheet and then asked the defendant to tell what happened at the arrest. The defendant said that it occurred in Boston Garden after a Bruins game. He had been shouting and screaming and police came over. They told him he was under arrest for disorderly conduct and began to pat him down. They found a lump in his pocket and removed a small leather drawstring pouch. The police opened the pouch and saw marijuana in it. They then told him he was also under

arrest for possession of marijuana. This signalled that there might be irregularities in the arrest procedure. The attorney interrupted at this point:

> Attorney: Was there anything hard in the bag?
>
> Defendant: No.
>
> A: Did the policeman take the bag from your pocket and open it himself?
>
> D: Yes.
>
> A: Did you resist or threaten the police in any way?
>
> D: No.
>
> A: Okay, finish the story.

The defendant continued by reporting that the police handcuffed him, put him into a paddy wagon, informed him of his rights, and took him to the station. At the station he was booked and then taken to police headquarters for fingerprints and photographing. Afterwards, he returned to the station, where he spent the night.

"Why were you arrested?" the attorney asked the defendant. The defendant replied that he had had "a few beers too many" and was pretty rowdy. "I probably deserved it." The attorney then thanked the defendant and said to make sure to show up on the trial date. After the defendant left, the attorney started to draw up a motion to suppress the introduction of the marijuana as evidence due to an improper search.

As these examples have shown, the Defenders vary the emphasis of the interview to fit the particular case. If the facts warrant it, the attorney delves into the possibility of

a procedural defense. Cases in which the client has no real defense or in which a finding of not guilty seems unlikely, bring about a disposition-oriented interview. Clients with exculpatory versions of the facts of a case evince interviews designed to bring out all the facts.

Trial Preparation: The type and degree of preparation for trial done by an attorney can play a significant role in determining both the finding and disposition of a case. Typically, methods of preparation used by Massachusetts Defenders included obtaining information from the prosecution, investigation of facts by MDC personnel, and consultation with fellow Defenders.

A commonly used means of trial preparation for Massachusetts Defenders was the use of relationships with the prosecution actors to gather information about the Commonwealth's case. The formation of these relationships seems to be a natural occurrence over time, despite the supposedly "adversary" nature of their encounters. Day after day the same half-dozen public defenders are engaged in combat-trial with the same half-dozen assistant District Attorneys and corps of police. This interaction between the defenders and the DA's though, is not entirely antagonistic. Possibly, this is due to the fact that the reward structures of the two groups are not really diametrically opposed. The primary payoff for prosecutors comes in the finding - guilty [or a pronouncement that sufficient evidence exists for a finding of guilty] or not guilty

The vast majority of cases end with findings of other than not guilty, however. The measure that distinguishes a fair defense from a good one is usually not the finding, but the disposition. Thus, the goals of the two theoretically adversary groups are often not mutually exclusive - the prosecutor seeks a declaration of sufficient evidence for guilt while the defender seeks a "light" disposition - and incompatibility of goals does not prevent a relationship.

In addition, there are pragmatic reasons for the two groups to establish relationships. Without violating any standards of ethics, there are many ways in which the prosecutors and defenders can cooperate and make each other's job easier. For instance, the prosecutor can give an oral outline of the Commonwealth's case against a particular defendant to the defense, while in return, the defender can accede to a reasonable prosecution request for continuance rather than press for a dismissal for want of prosecution. Conversely, the prosecution can agree to a defense request for continuance, while the defender can inform the prosecutor which of the several complaints against a defendant he is planning to try and on which he will admit to sufficient evidence.

According to one attorney in the Boston Municipal Court (not a Massachusetts Defender), this mutual cooperation is a "simple business relationship".

An additional factor which cements these relationships is

the commonality between the two groups. The defenders and prosecutors simply are friendly and helpful because they understand each other and can sympathize and empathize with each other. The defenders and prosectuors have characteristics in common - they are mostly young and usually look on their current job as a stepping stone in their career. Most public defenders and DA's took their job not because of deep-seated ideological commitment on one side or the other, but rather because it is the best way to gain trial experience. The major difference seems to be that the assistant DA's are perceived to have gotten their position through political connections while the Massachusetts Defenders Committee has personnel practices which are more egalitarian. It is hardly surprising that men and women of the same approximate age with similar backgrounds, goals, and motivations, who are in contact almost daily, are on friendly terms with each other. Often, I observed Defenders passing a few spare moments by chatting with a DA about their children, the weather, etc. In addition, it is not rare for a member of one side to "defect" and join the other, while keeping up friendships with his former cohorts.

A good example of prosecutor-defender interaction is provided in the case of the defendant charged with throwing a Molotov Cocktail. [This crime is a felony, so the preparation was for a probable cause hearing.] The defendant, in the interview with his attorney, had denied the charge and stated that anyone watching the incident could testify that the worst

thing he threw was a stick.

One day in court, the Defender saw the DA who was to handle the case and they struck up a conversation. The DA asked if the Defender thought a recent defendant who was found not guilty really was innocent. The Defender replied that he thought that the defendant may actually have committed the offense, but there was definitely a reasonable doubt. "By the way," the Massachusetts Defender said, "what do you have on that Molotov Cocktail case?" The DA replied that they had witnesses saying that they saw flames erupting from what seemed to be Molotov Cocktails and that two policemen claim that they saw the defendant throw the cocktail. The attorney then said, "Thanks a lot," and went back to work.

He later explained that as a result of that conversation, he would bring to the hearing several witnesses who would say the defendant did not throw the Molotov Cocktail, because the combination of prosecution's lack of supporting witnesses and the testimony of several defense witnesses might persuade the judge to deny probable cause or to reduce the charges.

In a different case, the defendant had been charged with Breaking and Entering in the night of a dime store. He claimed that he was just walking by the store, when a policeman grabbed him, saying "I know you were in that store." However, the defendant had no supporting witnesses. One day at lunch the defense attorney asked the DA about the case. The DA replied

that it was not one of his strongest cases - they had physical evidence of a break-in at the store, and two witnesses who live diagonally across the street from the store who had (separately) called the police to report a teen-ager in a blue jacket breaking the window of the store. On the basis of this information, the attorney decided to send out an investigator to determine how positive of an identification could be made from the two witness' residences.

Each example illustrates the degree to which attorneys use casual interactions with the prosecution to obtain information about upcoming cases. In both the cases the information gathered about the prosecution's case indicated that a favorable finding was possible. In the first example, the information caused the Defender to modify his planned trial tactics. In the second case, it influenced the defense counsel to utilize investigative resources to obtain even more information.

While the Defenders depend heavily on these ties with the prosecutors to gain information, they are also likely to take the more aggressive tack of conducting an investigation. If he or she feels it worthwhile, a Massachusetts Defender can send out an investigator to find out relevant facts for the trial. This resource is used primarily for Superior Court cases, though. Investigators were rarely used by Boston Municipal Court attorneys during my observations of them. More often, they would do their own investigation or use law students or other interns.

When formal investigation is carried out, its purpose is usually to gather facts for an aggressive, finding-oriented defense. Many investigations involve examining physical evidence and lines-of-sight. Others involve interviewing witnesses to, or the victims of, the crime in question.

In one case, for example, the defendant was charged with breaking and entering an MBTA collector's booth and attempted larceny from a safe. The defendant admitted to entering the booth but denied touching the safe. After the bail hearing, the attorney had asked the police what evidence existed for the safe charge. The policeman said that paint had been chipped off around the doors in a manner consistent with an attempt to pry off the door.

In this way, the critical element of the case became the condition of the safe. Thus, before the trial the attorney himself went to the MTBA station to examine the safe. He found that the paint on the safe was cracking and peeling on all surfaces and that the safe was in such a position in a corner that the defendant could not have been prying the door from the position that paint chips on the door would imply. Thus, through investigation of the site he was able to cast doubt on the prosecution's case.

Armed with all the information he feels he needs, and a good idea of the prosecution's case, the defender can place his attention on planning the trial defense. In this regard, he or she is constrained by two structural problems - time

and office space. According to two Massachusetts Defenders, their crowded trial schedule allows them only about forty-five minutes of preparation per case. This, of course, greatly constrains the scope of the attorney's preparation and encourages the use of information available in the court.

In addition, MDC attorneys share offices. One attorney however, indicated that the MDC's office shortage is a plus - whenever he thinks out loud, which is often, the attorney with whom he shares an office responds with criticism and/or suggestions. Another pointed out that the trips from court to the MDC office are fruitful in that methods of attack for particular cases are often discussed. These communal efforts seemed particularly effective in discussing procedural points, such as admissability of evidence, etc. In addition, there are often meetings of attorneys at MDC to discuss particular procedural issues.

Trial Day: Lawyers for the Massachusetts Defenders Committee lead a very hectic existence. During the course of my observations for this study, I did not observe a single instance in court of a Massachusetts Defender remaining in the same place for more than ten minutes. Included in their maelstrom of courtroom activities are such previously discussed "official" duties as being appointed counsel for a defendant, bail interviews, bail hearings, and other actions, which, although they would not appear on a job description for the position, are as much a part of being a Massachusetts

Defender as the "official" duties. Among the "unofficial" actions are: speaking with defendants on trial that day, speaking with prosecutors and police about cases scheduled for trial that day, and "cramming" for their trials.

Massachusetts Defenders usually speak before trial for at least a few minutes with non-incarcerated clients whom they are representing that day, mainly to insure that they have followed any instructions given earlier, and to make sure that no new problems have arisen. These conversations range from cursory to crucial and are at times in fact merely chance encounters. In one case, for example, in the Boston Municipal Court, the Defender literally bumped into one of his clients on trial that day for driving with no license, no registration and no insurance.

> Attorney: Hey, Leo! How ya doin?!
>
> Defendant: Not bad.
>
> A: Hey - d'you bring that stuff with you?
>
> D: Yep. [Shows lawyer his drivers license, registration, and insurance certificates]
>
> A: Great. Hey, I really like your shirt. Look, I've got to run - we shouldn't have any problem in court - you better get in the courtroom.

This conversation was informal and friendly, yet it served an important purpose - the defender learned in this meeting that the evidence needed to sustain the defense's case was present. Other conversations seemed to fit this general mold - relatively informal, perhaps checking a detail or two.

There are, however, other more critical purposes for pre-trial meetings. In some instances, for example, a particularly nervous client must be calmed down. This has not only the short-range benefit of peace of mind for the defendant, but also the long-range benefit of enabling the defendant to be a better witness should he or she be called to testify. In one case, a defendant charged with assault and battery thought that his appearance (lots of scars, tatoos, etc.) would prejudice the judge against him. This was causing him great anxiety and his appearance showed this. The attorney, then, felt it was imperative to calm the defendant down:

> Defendant: The judge is going to take one look at me, see the tatoos and my scars and he'll think, "This guy's a real street fighter!" I won't have a chance!
>
> Mass. Defender: That's bullshit! First of all, you don't look like a streetfighter, second of all, the guy who says he got hit looks tougher than you do, and third, the judge isn't that stupid and narrow-minded. He'll listen to the facts and do the best he can. He's not perfect, but he's better than you make him out to be. Look, you really better calm down. You say that you never hit the guy, and you sound pretty sincere to me. But if you get up on the stand and start sweating and stammering the judge'll think you're lying through your chattering teeth. Calm down, you'll do okay.

In a few instances, the need for major changes in the handling of a case is realized as a result of information gained in a pre-trial talk with the defendant. Most common among these were cases in which the defendant was unable to

get a crucial witness to appear in court. In one case, for example, a defendant had been charged with driving so as to endanger the lives and safety of the public. The specific charge was that the defendant had cut in closely in front of another car with no warning. The defendant's explanation was that he did cut in front of another car, but that the other car was driven by a friend of his who had motioned for him to cut in front and the the friend could testify to this.

Thus, the conversation between defender and defendant focused on this critical question of the availability of the witness:

> Attorney: Hi Gene. Did you bring Rico?
>
> Defendant: Well, he said he would come, but I don't see him anywhere. I told him 9:30 and gave him the same directions to get here that you gave me. I guess he's not coming.
>
> A: Dammit, Gene, this guy's a material witness. I'm going to have to try to get a continuance. If I can get the continuance, lean on this guy to show up - plead with him if necessary. If he doesn't show up, you're up shit creek without a paddle. Make sure he understands. I'll try to get a subpoena issued for him - that should encourage him to come, too.

Though the reasons for the Defender's interactions with the defendant are often focused on gaining information, last minute talks with the prosecutors are much more focused on the strategy of the case.

These talks usually involve bargaining with the prosecution, most often for continuances and "favorable" dispositions. In Gene's case, for example, the Massachusetts

Defender went to the DA handling the case and said, "On that driving to endanger case, my man couldn't get his witness to come today - what do you think about a continuance?" "Sounds okay - how about one week?" responded the DA. "Fine with me. Thanks a lot." When the case was called, the Massachusetts Defender would then ask for a one week continuance. The agreement of the prosecution would increase the likelihood of the judge granting this continuance.

As discussed in the section concerning pre-trial preparation, this sort of interaction between Massachusetts Defenders and prosecutors is fairly common. Often there will be a similar case with the exception that it is the prosecution seeking delay. Unless a particular hardship to the defendant is involved, the defender will also usually grant this request.

A second form of prosecution-defense interaction involves a form of pre-trial bargaining over the disposition of the case. Although I did not observe this occurring as often as have other observers of the District Courts, it is significant nonetheless. Most often this bargaining would occur prior to a probable cause hearing and would involve a tentative offer by the defense to admit to sufficient evidence to a lesser charge, allowing disposition to occur in the usually lighter-sentencing district court. In a case involving assault and battery with a dangerous weapon, for example, the defense attorney approached the DA with the following: "My client admits there was a fight. She claims though that the complainant

started it and it was originally self-defense on her part. She wants to end the whole thing, though, and is willing to pay the complainant's doctor bills. She's got a clean record - it's be a shame to mess it up for this." The prosecutor replied that it sounded reasonable and agreed to request the judge to lower the charge after he presented his witness. The DA said he would agree to a continuance without a finding with payment of restitution, but suspected that the judge might insist on a conviction with suspended sentence and probation.

The benefit to the defendant from her attorney's relationship with the prosecutor is enormous. Without their bargaining, probable cause most likely would have been found. In trial in Superior Court anything can happen, but, as a general rule, sentencing is much more severe there. Thus the defendant has avoided the very real possibility of a prison sentence and/or lengthy probation and a criminal record.

Whenever Defenders were not carrying out one of these many tasks, they would utilize the few spare moments to refresh their memories about the cases they were about to try. With only about 45 minutes of preparation per case, and about 20 new cases per week, it is easy to be unclear about the facts of a case or likely defense strategy right up until trial.

Trial: At trial, the Defender may perform a number of official duties critical to the conduct of the defense. These duties fall in one of three categories: those which are

"legal" defenses, those in response to the prosecution, and those which constitute an "aggressive case." The lawyers for the Massachusetts Defenders Committee often file motions as a "legal" defense tactic. By far the most common of these motions is the "motion to suppress" which is a request to suppress, or disallow, certain pieces of evidence on the basis that they were improperly obtained. The usual bases for this request are, for physical evidence, that the seizure of the evidence was as a result of an improper search, and, for testimonal evidence, that the defendant had not been properly informed of his rights at the time he gave the testimony.

It is often said among the "regulars" (i.e., attorneys whose primary practice is in the Boston Municipal Court) that Massachusetts Defenders will file a motion to suppress at the drop of a hat. While this is a bit of an exaggeration, it is true that Defenders commonly use this tactic. However, they have a good reason - it works. As one Massachusetts Defender explained it, "The courts, especially the lower courts, have been traditionally lenient on evidence allowed in. The police realize this, and get sloppy in their investigations. Now we come along and sock 'em with motions to suppress and their sloppily-gotten evidence is excluded. It takes a long time for police to change their habits. So, until they catch on and clean up their investigatory methods, we win a lot of easy cases by zapping the incriminating evidence."

A good example of this tactic is provided by the case of

the young male who had allegedly been behaving in a rowdy manner after a hockey game at Boston Garden and was found to have marijuana in his possession during the course of his arrest for disorderly conduct. (The marijuana was discovered in a leather pouch which was found on the defendant while patting him down.)

The attorney prefaced the trial by submitting a motion to suppress, alleging that the policeman who discovered the marijuana had neither a search warrant or other probable cause. The motion stated that it was unlikely that the policeman could believe that a soft leather pouch was a weapon, and even less liekly that, having discovered the bag and felt it, he could believe that it posed any threat to him. The motion further alleged that the policeman had no reason to suspect presence of marijuana in the bag. Therefore, since the policeman had neither a warrant or other reason to search acceptable under the latest Supreme Court rulings, the evidence was improperly obtained and, thus, should not be admissable in court.

The prosecutor, who had been warned of this motion to suppress by the Defender, appeared to be conceding defeat. He made a pro forma defense against the motion, arguing primarily that the policeman had a right to look in the bag because there was a reasonable suspicion that it might contain a weapon of some sort. Apparently to no one's surprise, the motion was granted, and the evidence disallowed.

A second major strategy for defense occurs at the trial stage. After direct examination of the prosecution's first witness (and succeeding witnesses) by the DA, the defending attorney has the right of cross-examination. Rarely did a Massachusetts Defender pass up this opportunity. Cross-examination by Massachusetts Defenders generally involved one or more of three purposes: to bring out additional facts not elicited in direct examination, to cast doubt on statements made in direct examination or by other witnesses (both of which have the intent of building up facts to support a suitable finding), or to focus on disposition by not challenging the witness' version of the facts, but eliciting statements from the witness which, although not denying or excusing the crime, present the defendant's character in a positive light (e.g., that the defendant did not resist arrest).

Since the Massachusetts Defenders use this third form of cross-examination quite heavily it is often the subject of successful objections by prosecutors. Generally, however, it had produced the desired impression by the time it was halted. For example, in a case involving four teenagers charged with disorderly conduct in a dime store, the prosecution witness, a clerk in the store, testified that the four youths has been playing catch in the aisles of the store with a toy football, causing breakage of several items, and that they had turned off the escalator while passengers were on it. On cross-examination, the defender asked the witness to repeat some

of the facts stated under direct examination, and then continued in the following vein:

Attorney: Now, you've testified that you saw the defendants perform in a rowdy manner in the store. Is that so?

Witness: Yes.

A: When you saw this behavior did you approach the defendants?

W: Yes, I did.

A: Did you say anything to them?

W: Yes.

A: What did you say?

W: I told them that they would have to stop what they were doing.

A: Did they stop?

W: Yes.

A: Did they say anything else?

W: Yes. They said that they had gotten carried away and that they were sorry.

A: Was there any more trouble until the police came?

W: No. The defendants were quiet and, in fact, quite apologetic.

A: Thank you.

Rarely did a witness testify against a Massachusetts Defenders' client who was not the subject of some finding-oriented cross-examination. Although most of this cross-examination is standard (e.g., "What color jacket was he wearing?"), there were a few Defenders with their own particular style. One defender, while apparently stalling for thinking time, would challenge the eyesight of any witness who had been farther than arms length from the event witnessed. If the witness was not wearing glasses on the stand, the ex-

change would go as follows:

Attorney: Do you own prescription eyeglasses?
Witness: No.
A: When was the last time your eyes were checked?
W: About two years ago.
D: What was your vision at that time?
W: 20-20.

If the witness was wearing glasses, the questioning would center around his or her uncorrected vision and corrected vision. Although this technique was seemingly intended only as a stall for time, on one occasion a major witness testified that he had uncorrected vision of approximately 20-200 and had not been wearing his glasses at the time of his observations. Resultingly, the defendant was acquitted.

On a few occasions, questions for cross-examination were inserted as a direct result of investigations by the MDC staff.

While the defender can merely respond to the prosecution's case by cross-examination, he can also construct an aggressive case by presenting defense witnesses. In a rather large number of cases, however, the defender did not present any witnesses. As the Defenders explain it, these are primarily cases in which the defendant's attorney feels that an admission of sufficient facts is called for, but the defendant claims innocence. No defense witnesses are provided because there are none who support the defendant's story. In those cases in which there were observers whose views of the occurrence

were favorable to the defense, they, obviously were called on to be defense witnesses.

Defenders tended to call the defendant as a witness more often than they sought other witnesses. In general, there were two modes in which the defendant testified in his own behalf, depending primarily on the defender's judgment of the defendant and the case. In the first type, the defendant would deny the charges in a convincing and detailed manner. The decision about whether to place the defendant on the stand to conduct this kind of defense was explained by one Defender as follows:

> I have a simple rule of thumb - if the defendant has been able to convince me of his innocence, I put him on the stand. I figure if he can convince me, a guy who's heard hundreds of stories, there's a good chance he'll convince the judge. If he doesn't convince me, then his testimony under direct examination probably won't be very effective, and cross-examination from the DA might tear him to shreds, so I don't put him on.

The second role played by the defendant on the stand involved the defendant never denying committing the action stated on the complaint, but, rather, citing mitigating circumstances. This tactic was used especially in probable cause hearings, in which the defendant's testimony was used as a point of leverage to get the charges reduced to crimes within the jurisdiction of the lower court.

A final opportunity a lawyer may seize for building a defense is at the summation stage. In cases in which no

defense witnesses were presented, this opportunity was usually declined, since there was no real "defense version" of the case to review. In those cases in which defense witnesses were presented, the Defender almost always utilized this opportunity to recap the defense's case. Invariably these presentations were low-key recitals of the logic behind the defense culminating with the "inescapable conclusion" that the defendant could not (or, at the very least, might not) have committed those crimes of which he or she is accused. Subsequently, the prosecution may respond to the defense , and sum up its case.

Finding and Disposition: After the summations by the defense and prosecution, in about 75% of the cases (approximately 90% if we omit auto-related cases), the judge announces that he has determined that there is sufficient evidence for a finding of guilty, and asks the attorneys if they wish to be heard on disposition.

Since judges have extremely wide latitude in the range of dispositions they may choose, that part of the trial which determines dispositions is very important. Several Massachusetts Defenders indicated to me that they feel that the disposition arguments are the most important part of their job.

Thus, Massachusetts Defenders never failed to speak about the disposition. In most cases, they used a very predictable set of arguments. If the defendant had no prior criminal record, they aimed for a continuance without a finding, arguing

that a criminal record would haunt the defendant for life and he or she deserves one more chance. At the very least, their argument went, a prison sentence would be highly inappropriate.

For those defendants with previous continuances but no convictions, on the other hand, the argument revolved primarily around "one more chance." Any mitigating circumstances stated or alluded to in the trial are used to support these arguments, as are "positive" aspects of the case. A similar argument is used with those clients who have substantial previous records and are thus usually characterized as being about to turn over a new leaf in their lives. Mitigating circumstances and "positive" aspects of the crime are also relied upon heavily here. The goal in these cases is to minimize the length of the sentence, or, if possible, have it suspended entirely.

In some cases with unusual defendants or fact patterns, Massachusetts Defenders did use divergent arguments to gain the best possible dispositions for their clients. If his or her client had any sort of a physical or emotional problem which might have contributed to the incident for which he or she was arrested, the Massachusetts Defender would often deem the unfortunate affliction as the true culprit and would suggest as disposition a continuance without a finding combined with treatment for the defendant's problem. Most common among these cases are those involving alcohol. In cases in which the defendant had been driving under the influence the Defender automatically asked that the defendant be assigned to ASAP

(Alcohol Safety Action Project). In non-auto cases (such as disorderly conduct), Defenders have asked for continuances with the condition that the defendant enroll in AA. Also common is the use of a defendant's drug addiction to try to avoid prison. In cases in which the defendant's crime related to his or her need for money to support a drug habit, Defenders often asked for a continuance combined with an order to the defendant to enroll in a drug treatment program.

While the goal in each of these arguments was to avoid prison, if it was clear that the defendant would be given a prison sentence, the Defender would still argue. His intent, however, would be not only to lessen the time served, but to affect the choice of correctional institutions. For instance, in the case of a defendant with a drug addiction, the Defender would suggest that he or she be sentenced to Massachusetts Correctional Institution at Bridgewater, which has facilities for inmates with drug problems. In general, there seemed to be "soft" prisons and "hard" prisons, and the Massachusetts Defender would recommend sentencing to the softest possible.

II. Appointed Private Counsel

The sequence of courtroom events in the Municipal Court of the West Roxbury District is virtually the same as in the Boston Municipal Court. For an indigent defendant, however, the similarity ends there. The defense he will receive from his appointed counsel is very different in both preparation and strategy from that which is provided by the Massachusetts Defenders Committee.

Arraignment: Unlike the Boston Municipal Court, most defendants awaiting arraignment in the West Roxbury Court are not incarcerated. Rather than observing courtroom procedures from the "dock", most of the defendants await their turn sitting in the spectator seats in the rear of the courtroom. The experiences of Joe Blake are typical. Having arrived at court at 9 a.m. as told, he waited for almost two hours until a case concluded and the clerk shouted, "Joseph Blake! Joseph Blake! Come to the court."

It is here that the formal arraignment procedure begins. Blake walked to the defendant's stand, where he remained standing while the clerk intoned the complaint - larceny of a television set of value $110 from persons unknown. The clerk, however, did not state it quite as simply - he read the entire complaint, which informed the defendant that he had violated the Massachusetts General Laws, Chapter so and so, etc., on the eleventh day of February ... This was read rapidly in a raspy

voice and was very difficult to understand. The defendant appeared bewildered.

The judge continued with the formal arraignment ceremony:

Judge: Mr. Blake, do you understand what you are charged with?

Defendant: No.

J: Mr. Blake, you're charged with taking a television set that isn't yours. Do you understand?

D: Yes. Thank you.

J: You have a right to plead not guilty. Do you please not guilty?

D: [nods]

J: You have a right to be defended by an attorney. Can you afford an attorney, Mr. Blake?

D: No.

As is the typical procedure in this court, the judge then asked Blake to deal with the question of indigency privately, at the bench. At this conference, the judge asked the defendant to tell him how much he was earning per week, how many dependents he had and other information which would enable him to decide whether the defendant was entitled to a court-appointed attorney. Evidently, the judge was convinced of Blake's indigency, for he announced that the court would appoint an attorney to defend him. Hearing this, the chief probation officer came bounding forward with several sheets of paper. The judge said, "I'm going to appoint attorney Perry to defend you. Can you come back in three weeks?" Blake said yes, and the clerk then announced that the case was to be continued for three weeks, and that the court had appointed attorney Perry

to represent the defendant. Blake was then told to see the chief probation officer before leaving the court house.

Formally, the probation officer would explain to the defendant how to get in touch with his attorney, but in fact the probation officer took a much more persuasive role. As Blake left the stand, the probation officer literally grabbed him and took him to his office, where he handed the defendant a card with the appointed attorney's name, address, and phone number and said:

> Look, larceny's a pretty serious thing. I'm not saying you're guilty - just that it's serious. It's really important that you have a lawyer. Understand? Now this man Perry - he's a good lawyer - he'll protect your rights. Okay? Now, when you get home call Mr. Perry and set up an appointment to see him. You gotta do this. He's not going to chase you to kingdom come - you gotta get him. When you see him, tell him your case has been continued until March 5. If you have any problems, or can't get in touch with Perry, call me. Look, whatever you do, make sure you show up here in three weeks. Good luck.

In playing this role the probation officer was both preparing the defendant for the possibility that the attorney would not contact him and protecting the lawyer from having to pursue the client. While most attorneys on the court's list will make some effort to contact a defendant whom they have been appointed to represent, I was given the impression that having to seek out a defendant lowers both the attorney's opinion of his client and his desire to do everything possible to benefit him. As one attorney said, "Hell, I defend my clients to the best of my ability, but I'll be damned if I'm

going to bust my balls for some guy who doesn't care enough to get in touch with me."

Bail: In cases in which there is a possibility that the defendant might be held for bail the procedure varies from the Blake case. Typically the judge announces that he will continue the proceedings until later, at which time there will be a bail hearing, but it is extremely rare that the attorney appointed to represent him at trial is present at court on the day of arraignment. Therefore, a different attorney must be appointed for the bail hearing.

The process by which this attorney is assigned is quite different from the formal assignment at arraignment. In West Roxbury, it was typical for the judge to scan the courtroom until he came across an attorney he wished to appoint and then say, "Mr. Jones, can you take a bail hearing?" After agreeing to take the hearing, the attorney would look at the complaint and take the defendant into the corridor to interview him. Because of the short time available for preparation, most attorneys have developed a standard set of questions for this interview with an eye to a definite courtroom strategy. The attorney asks the defendant about his family, job, etc., and if he has been arrested previously. If he has been arrested, the attorney usually asks whether there are any defaults on his record and what was the final disposition of the charges against him.

Armed with this information the attorney returns to the courtroom to present the defendant as a person suitable for low or no bail. When the case is called again, the complainant will summarize the incident and the attorney will then state his case. Typically, as with the Massachusetts Defenders, he or she will recite factors such as job stability, family ties, and length of residence in Boston as reasons to set low bail. Unlike the Massachusetts Defenders, though, the attorney does not seize upon traits which, although they are not legal justifications for determination of bail, might inspire understanding and/or sympathy for the defendant. It seems clear that these ploys are unnecessary in this court, however, and therefore the attorneys merely present minimal information about the client. In fact, in all the days I spent observing in West Roxbury District Court, no defendants were held for bail.

After a bail hearing in which the defendant is released on personal recognizance, he or she sees the probation officer and is given the same speech received by Blake (above), with the name of the attorney appointed to represent him inserted in the appropriate places. The attorney who handled the bail hearing will have no further contact with the defendant or his court appointed attorney.

The Interview: There are approximately three weeks between arraignment (and appointment of counsel) and trial in a typical case. This is a particularly critical stage, because, in this time, the defense attorney must gather all the information

he or she needs to adequately represent the defendant. The primary source of information for the attorney is, as for Massachusetts Defenders, the interview with the defendant. Since I was unable to observe any client interviews by West Roxbury defenders, I cannot report directly on the interviewing practices of these attorneys. However, I did talk with several West Roxbury attorneys about their preparations for trial and, therefore, can discuss what they perceive they do during the interview process.

I asked one attorney how he had prepared for trial in a breaking and entering case. He explained as follows:

> Well, about two and a half weeks ago, I got a call from a gentleman who told me that he had just come from court and that he had been given my name to call. The first thing I did was to ask him which court. (You see, I'm also on the list in Brighton.) He told me West Roxbury. I asked him if he could come to my office on the following Monday afternoon and he said yes. On Monday afternoon, he came by and I interviewed him. I asked him to tell me his side of the story concerning his arrest. He said that he didn't know why he had been arrested - he was walking down the street minding his own business. "Are you sure?" I asked him. He said yes. It's hard to defend a guy with a story like this - you never know what the prosecution has. But the guy stuck to his story. So, I asked him about his family, thinking that if he was found guilty justice might be better served by no prison sentence if he had kids or something. Well, he had a wife and kid.

This account indicates the attorney's emphasis on the strength of the defendant's story with respect to the likely finding. Conspicuously absent from his interview is any attempt to gather information concerning the arrest and charging of the defendant. Although in a majority of cases this

information is of little use, it can, as we have seen in the case of the Massachusetts Defenders, make the difference between conviction and acquittal. Lack of interest in this information would seem to indicate a rejection of defenses based on procedural violations or illegally gathered evidence. This observation was confirmed by a different appointed attorney in West Roxbury who said in response to an inquiry about challenging of evidence, "My job is to defend the accused, to assure him of a fair and impartial hearing - not to raise test cases and constitutional litigation." It is also important to note that the attorney ignored the possibility of learning the Commonwealth's case against his client.

The remainder of the information requested by the attorney in his interview was very similar to that requested by Massachusetts Defenders, except it is significant that the attorney rationalized his request for disposition-related information (e.g., family ties, etc.) as being in the interest of justice, rather than for the benefit of his client.

Trial Preparation: It appears, not surprisingly, that the private attorneys have greater time and resources available for investigation of the facts of a case than do the Massachusetts Defenders. The attorneys interviewed all stated that they invest substantially more time in trial preparation than the 45-60 minute average reported by the Massachusetts Defenders. The critical issue, however, is whether the difference in preparation times alters the lawyer's defense strategy. Here,

as in other stages, the lawyer is hampered by his lack of integration into the court system.

Most private attorneys invest the majority of their preparation time in trying to determine the exact facts of their client's alleged offense. A commonly stated method of preparation, for example, was to seek out witnesses to the incident. An attorney stated that his first act upon receiving official notification of appointment to a case is to call up all the "civilian" witnesses listed on the complaint forms. When what he meant by "civilian", he said, "Oh, you know, everyone but the police." Here the attorney has neglected the possibility that, if asked, the policeman might tell him his version of the incident.

Beyond their general focus on events leading to arrest, there is a great diversity of types of preparation in which private attorneys engaged, and no overriding defense "strategy." A second attorney, for example, stated that upon receiving notification of appointment, before meeting with his client, he goes to the scene of the alleged crime. There he tries to find witnesses to the incident who were not listed on the complaint. His explanation for this course of action is that he can guess basically what the witnesses listed on the complaint will say; he wants to hear from those witnesses, if any, who chose <u>not</u> to join in the prosecution/police version of the events (or conversely, whom the prosecutors/police did not select to bolster their case). He noted that this process is

usually fruitless, but is made worthwhile by occasional spectacular results.

Still another attorney stated that his preferred method of investigation is to "let the client do the work." He instructs his clients to set up meetings between any witnesses that the client feels will corroborate his story and the attorney. He has his client take him to the scene of arrest and re-enact the events which occurred at that time. The attorney, meanwhile, examines lines of sight, physical evidence remaining at the scene, etc.

All of the above methods of investigation can be effective and, combined with knowledge gained from the interview of the defendant, do give the attorney the wherewithall to present an acceptable defense. However, lack of integration into the court community did limit the preparation in which these attorneys could engage. No defenders with whom I spoke had consulted with the prosecution or the police before trial day. Structuring a defense while knowing little or nothing of the Commonwealth's case seems analagous to a nation gearing for war without intelligence reports of the enemy's strengths and vulnerabilities. As one attorney said, "It would help to be able to read the prosecutor's mind."

Trial preparation after the interview and investigation is even less systematic than these prior stages and, in fact, is very much a "brainstorming" affair. The defender doesn't

necessarily do anything in particular - he or she just thinks. Unlike Massachusetts Defenders, most of the West Roxbury attorneys, including those in partnerships or firms, develop their plan of defense with no input or feedback from others. Also unlike Massachusetts Defenders, though, the typical West Roxbury attorney spends a good deal of time deciding his course of action. West Roxbury attorneys reported to me that, on the average, they spend two to three hours (considerably more than Massachusetts Defenders) determining their trial tactics. Their preparation appears to work well - attorneys came to court knowing what they planned to do and say, and knowing their vulnerabilities.

Thus, there exists a significant difference in pre-trial preparation tactics between West Roxbury attorneys and the lawyers of the Massachusetts Defenders Committee. It seems that at each stage of the preparation process, the Massachusetts Defenders consider more options and weigh a wider variety of tactics to enable the presentation of an "aggressive" defense than do the attorneys in West Roxbury. However, these attorneys, due to the much larger time available to them for preparation, are able to plan out their courtroom actions in advance in a more detailed fashion.

Pre-Trial Activity: In great contrast to the actions of the Massachusetts Defenders, the primary courthouse activity of West Roxbury defenders on trial days is sitting. These attorneys are able to sit because, unlike MDC attorneys, they

do not interpret pre-trial preparation to include last-minute talks with prosecution actors. In addition, the West Roxbury attorneys simply are not as busy with other matters as the Massachusetts Defenders.

On a typical day, appointed counsel would arrive at the courthouse at about 9:20 a.m., sit in the back of the lawyers enclosure, and wait silently until the names of their clients were called. Sometimes an attorney would open his attache case and remove some papers and pore over them, occasionally jotting down a note. It was impossible to ascertain if this was final preparation for trial or, rather, use of dead time to catch up on other business. On only two occasions did I observe any conversations between a defender and a district attorney. Interestingly, both of these conversations were initiated not by the defender, but by the DA.

Trial: In contrast to the Massachusetts Defenders, the appointed defense counsel in West Roxbury, as a rule, conducted trials that were almost entirely finding-oriented, with little emphasis on facts relating to possible dispositions. By cross-examination of prosecution witnesses, and the direct examination of defense witnesses (often including the defendant), these attorneys put the majority of their energy into efforts to bring about a finding of not guilty. No effort was made to mount procedural defenses, and only limited disposition-oriented testimony was introduced.

Unlike those cases involving Massachusetts Defenders, I observed no cases in West Roxbury in which any pre-trial motions were filed. This follows in part from the lack of interest in the arrest process displayed by these lawyers. The point of view held by the attorney quoted earlier, who stated that it is not his job to "... raise test cases and constitutional litigation" seems prevalent. It should be noted, however, that, contrary to the perceptions of these attorneys, a standard motion to suppress rarely treads on new constitutional ground or becomes a test case.

While they do not employ motions as a legal strategy, these attorneys do use cross-examination. After each prosecution witness is called and heard on direct examination, the defender cross-examines him. This process usually took one or both of the two "traditional", or finding-oriented, forms - cross-examination to bring out additional facts not elicited in direct examination, or cross-examination to cast doubt on testimony already given. Rarely used was the MDC tactic of disposition-oriented cross-examination. In virtually all cases, then, the cross-examination was directed at getting all the facts on the table. For example, in a breaking and entering case, the first prosecution witness testified under direct examination that she had been sitting on her porch when she saw two men incessantly trying the doorbell of a house diagonally across the street from her (approximately 25-35 yards away). They rang for several minutes and then she saw both men enter the house. At this time she called the Brookline police.

In cross-examination the defendants' attorney asked three questions:

Attorney: Did you see the two men leave the house?

Witness: No.

A: Do you know how far away the men were when the police arrested them?

W: No.

A: Why did you call the Brookline police?

W: My house is in Brookline, the house across the street is in Boston.

These find-oriented questions were designed to point out the "holes" in the story left by this witness' testimony, with the hope of using this as a basis for acquittal.

Several differences appear to exist between the cases of cross-examination by West Roxbury defenders, and by the attorneys of the Massachusetts Defenders Committee. Though the West Roxbury attorneys usually employ cross-examination, it is significant that they let prosecution witnesses pass with no cross-examination much more often than do Massachusetts Defenders. Thier philosophy, which seems to be a variant on "Let well enough alone," is vastly different from that of the Massachusetts Defenders whose motto could be "Try Anything Once."

However, when West Roxbury defenders did cross-examine a witness, they seemed to have a good idea of what they were seeking. Occasionally, when a witness gives an unexpected answer, Massachusetts Defenders must think on their feet. West Roxbury defenders, on the other hand, seem to have a plan

for all contingencies (which, however, tend to occur more often to West Roxbury attorneys than to the MDC, due to their lack of knowledge of the prosecution's case). This is as a result of the greater preparation time available to West Roxbury defenders.

The West Roxbury defenders appear to behave in a similar manner to Massachusetts Defenders with respect to calling witnesses. For example, if the attorneys in West Roxbury know of any observers to the incident in question whose view of the occurrence is favorable to the defense, these observers all called to be defense witnesses. Once again, though, "favorable", to West Roxbury defenders, means favorable with respect to finding, not disposition.

Similarly they tend to call the defendant as a witness under the same kind of conditions as do the Massachusetts Defenders. In fact, for the most part, this aspect of the trial is the only one in which West Roxbury defenders allow disposition-oriented material to sneak in - in several instances, defendants were put on the stand to point out mitigating circumstances of their alleged wrong-doing. In addition, defendants were put on the stand when they were capable of denying guilt in a convincing manner.

The use of closing statements, on the other hand, was sporadic among West Roxbury defenders. In cases in which no defense witnesses were called, closing statements were not made. In a majority of cases in which a full defense was

mounted, the attorney made a closing statement; however, in a large number he did not. Perhaps this resulted from an assumption that the judge could follow the logic of the case without help. Those cases in which closing statements were made were conducted in a similar manner to MDC style - low key and logical with a minimum of emotional argument.

Disposition: Unlike Massachusetts Defenders, the appointed counsel in West Roxbury do not appear to place major importance on disposition arguments. In cases in which the judge ruled that there was sufficient evidence to warrant a finding of guilty, counsel were permitted to speak about disposition. All West Roxbury defenders took advantage of this opportunity. Disposition arguments by these attorneys were traditional for the most part. They concentrated on the prior record (or lack thereof) of their defendant, family circumstances, and any mitigating circumstances alluded to in trial. Very rarely did they allude to particular emotional or physical problems of their client to affect the disposition.

Behavior at trial among these attorneys consistently followed the pattern indicated above. Deviations were rare. One case illustrates particularly well that this behavior is what the court expects from its attorneys:

The case involved a teenage boy charged with breaking and entering into a school and destruction of property. The prosecution established that the school had been damaged and that

the defendant had been in the school with other youths, but, under cross-examination, all the witnesses admitted that they had not seen the defendant break in. After the prosecution rested, the defender moved for a directed verdict of not guilty on the basis that the charge was breaking and entering and that although it could be established that the defendant had entered, there was no evidence that he had broken in. In addition, the attorney argued, none of the destruction could be laid directly to the defendant. This motion was denied. The attorney then called the only defense witness - the defendant's mother. The defender asked her about her son's medical history. The mother went on to tell of an accident in which the defendant had been involved, after which his behavior has not been the same. She displayed several letters from psychiatrists which she had brought with her.

Following this testimony the defender asked for a verdict of not guilty on the basis that the defendant had not been responsible for his actions. The judge, however, stated that there was sufficient evidence for a finding of guilty and said that he would consider the medical evidence in disposition. He continued the case without a finding and ordered the defendant to pay restitution.

After the conclusion of this case, the judge gave a brief speech extolling the work of the attorney, calling it "above and beyond the call of duty," and stating that he wished he could pay the attorney more for his exemplary services. The

fact that the judge thought that the attorney's conduct of the case was unusual enough to deserve such lavish praise establishes the rarity of such conduct even more firmly than my limited observations.

FINDINGS

After completing observation of both the private and public attorneys in action, I analyzed the data collected, attempting to answer the questions set out earlier [see Methodology]. The data yielded important findings about these two methods of providing defense for indigents.

The case studies indicate that there are indeed significant differences in the types of representation provided by the two groups of attorneys. These differences can be grouped into three general categories:

(1) The scope and variety of activities performed by the attorney at each stage of the proceedings
(2) The focus of the attorney's defense effort
(3) The attorney's role

Easily the most striking difference between the Massachusetts Defenders and the private attorneys in West Roxbury was the large variation in the activities performed at each stage of the defense process. At each point of the defense effort the attorneys of the Massachusetts Defenders Committee typically sought more information, employed more sources, and more often took advantage of standard trial tactics.

In regard to the collection of information for defense, the West Roxbury attorneys typically sought data only about the alleged offense, their client's previous record and (occasionally) about the defendant as a person. The MDC attorneys, on the other hand, sought those pieces of information and a great deal more. In addition to the alleged offense, they

inquired into the arrest itself and the process of taking the defendant into custody, along with any mitigating circumstances of the offense. Furthermore, they attempted to learn both the facts and the relative strength of the prosecution's case. The Massachusetts Defenders placed greater emphasis than did the private attorneys on getting information about the defendant's character and on learning about any particular characteristics of the defendant (e.g., drug addiction) which might imply the use of a different defense strategy.

The two groups of attorneys also differed widely in the sources from whom they received information. The private counsel used the defendant as the primary source of information, with some information sporadically coming from investigations which they themselves carried out. The public defenders used a significantly augmented set of sources. In addition to the word of their defendants, and occasional investigation, they used the resources of the Commonwealth of Massachusetts through talking with the prosecution actors. The policemen and the DA's have shown themselves more than willing to share the information they have gathered, and the Massachusetts Defenders exploit this fact to the fullest possible extent. This larger set of sources of information allows the Massachusetts Defenders to work much more efficiently in that they are able to gain more data with a smaller expenditure of time and effort.

The Massachusetts Defenders were also more consistent than the West Roxbury attorneys in the use of "standard" trial tactics.

While the private counsel would often forego cross-examination of a prosecution witness, and occasionally omit either a closing statement or disposition argument, the public defenders virtually always used these tactics. Similarly, while the private attorneys tended to use a stark, fact-oriented defense with no frills in almost every case, the MDC attorneys often used procedural defenses, such as motions to suppress, and disposition-oriented methods.

There is only one commodity which the private counsel utilize more than do the public defenders - time. The attorneys of the Massachusetts Defenders Committee are saturated with clients and can affort to spend only about forty-five minutes on any one case. The private attorneys, on the other hand, tend to spend several hours of their time on each case. This extra time appears to be devoted not to gathering more information, but to "brainstorming" for the appropriate techniques to be used in the trial.

A second major difference in the type of representation provided by the two types of defender involves the focus of the defense effort as seen by attorneys. The private counsel, in general, had one aim - to have his clients judged not guilty on the basis of <u>facts</u> presented in trial. In fact, the types of information gathered by these attorneys allow only this type of defense. Since no information is collected about the arrest and entry into the justice system of their clients, procedural defenses aimed at an eventual finding of not guilty

are not possible. Similarly, no mitigating circumstances of the alleged offense and very little personal information about the defendant are sought, minimizing the likelihood of strong disposition arguments.

The apparent goal of the attorneys of the Massachusetts Defenders Committee, on the other hand, is to keep their clients out of prison. Since the overwhelming majority of defendants in criminal cases are not found not guilty, this implies a significant emphasis on tactics aimed at a favorable disposition. This does not mean that the Massachusetts Defenders do not do everything in their power to bring about a finding of not guilty; rather, it is simply true that the experiences of the group point to the relative lack of success among all lawyers in receiving not guilty findings. In keeping with this belief, the Defenders tend to collect information which will lead to a lenient disposition. Even during the theoretically finding-oriented trial, for example, the defenders sow the seeds for the disposition arguments. By evincing testimony which brings to light mitigating circumstances of an alleged offense, or which places the defendant's character in a positive light, an attorney lays the groundwork for the disposition hearing. In addition to disposition arguments based on mitigating circumstances and the defendant's character and previous record, the Massachusetts Defenders will often utilize information gathered about a special characteristic of a client (for example, drug addiction) to influence the disposition decision.

These differences in the kind of information gathered and the tactics used have obvious implications for the overall role played by the attorneys. The attorneys in West Roxbury most often seemed to take the role of "defender." The "defenders" basically performed two tasks - they defended the courtroom rights of their clients, and they assisted their clients in attempting to refute as yet-unproven allegations. Both of these tasks were seen as being in the interests of "justice," which appeared to be the ultimate goal of "defenders". [This goal was exemplified by the attorney who rationalized his quest of disposition-related material as being in the interest of "justice".] Performance of the role of "defender" required a modicum of vigilance for violations of trial procedure potentially damaging to the defendant, and a competent presentation of the defendant's story.

In contrast, the MDC attorneys consistently performed as "advocates" for their clients. This role differed significantly from the "defender" role in that the "defenders" aimed primarily for the abstract standard of "justice," while the "advocates" devoted their efforts to a more concrete goal of obtaining a favorable outcome for each particular client. The role of "advocate" was manifested by the Defenders' aggressive defense, utilizing any tactic which might conceivably benefit the defendant. In addition to presentation of the defendant's story, this involved utilization of pre-trial motions designed to bring about a finding of not guilty on procedural grounds,

heavy use of cross-examination, and consistent use of closing statements - all aimed toward the finding - and the variety of disposition tactics discussed above.

It seems likely that the structural differences between the two defense systems do contribute to the differences in defense type. In particular, two of the differences originally hypothesized as potential factors - frequency of attendance at the court and group vs. individual practice - were found to be important, along with one additional variable - the attorneys, themselves.

The daily court attendance by Massachusetts Defenders appears to have two significant implications. First, the regularity of their appearances affords them the opportunity to get to know other courthouse "regulars" - especially prosecutors and police. By making these acquaintances, the Defenders establish a major source of information on future cases. As discussed earlier, this information not only aids the defense effort by suggesting strategies and adding to the attorney's level of understanding, but also allows the attorney to make more efficient use of his most constrained resource - time. The infrequent nature of their courtroom appearances minimizes the ability of the West Roxbury attorneys to establish similar relationships.

Second, an attorney constantly in court cannot help but notice that the vast majority of defendants are judged to be

convictable. This fact seems to have the eventual impact of influencing him to not only try for acquittals, but also to attempt to minimize the punishment of those clients not found innocent. An attorney who handles only nine cases a year is not as likely to be influenced by this. In other words, it appears that a high frequency of courtroom experience tends to increase the likelihood of strong usage of disposition-oriented tactics.

The group nature of MDC practice also appears to have a significant effect. The Massachusetts Defenders are remarkably homogeneous in their approaches to defense. This homogeneity is surely not a mere coincidence. All new Massachusetts Defenders go through an orientation and training period before being assigned to cases without supervision. It is very likely that the characteristics exhibited by these attorneys - the orientation toward "advocacy", the emphasis on dispositions, and the dependance on complete information - are, to an extent, learned during the training period. The constant presence in court of their cohorts adds to this socialization.

There seems to be one other important difference between the systems which brings about differences - the attorneys themselves. The private defenders were, on the whole, attorneys from small firms with open time (i.e., a need for more clients). Often they were tort attorneys whose business had suffered with the passage of the no-fault insurance laws. The public defenders, on the other hand, were young attorneys seeking

experience who wished to use the position as a stepping stone in their careers. It is logical to suppose that an attorney seeking experience is more likely to put on aggressive defense (if for no other reason than the experience) than an attorney merely trying to fill up his calendar.

It is significant that I was able to identify no discernible, separable effects from either the differences in methods of remuneration to the attorneys or the public-private dichotomy. The lack of effect from the difference in payment-systems has two likely causes: (1) The payment of one standard fee to the private attorneys does not influence their defense methods, since no particular strategy or level of effort is rewarded more than any other. (2) The public defenders, for the most part, choose their job not for its financial rewards but for the experience they gain in it.

The public-private dichotomy had no effect, most likely, because the public defenders did not perceive their employer to be "the public." They seemed to behave as though the Massachusetts Defenders Committee were a large firm specializing in criminal law, and, thus, that their efforts were to be directed to the welfare of their clients.

CONCLUSIONS AND RECOMMENDATIONS

I. Conclusions

This study has obtained empirical data concerning both public and private systems of indigent defense. These data provide insight into the specific issues raised in existing literature and go beyond these studies to make more general statements about the behavior of the two types of counsel.

The existing literature concentrates heavily on the issues of plea and sentence bargaining between defense attorneys and the prosecution. In particular, it implies that these types of bargaining are very common throughout the system, and that they implicitly violate the concept of due process by assuming the guilt of the defendant.

My experiences in the West Roxbury and Dorchester District Courts and in the Boston Municipal Courts indicate that, at least in these courts, plea and sentence bargaining are not pervasive. Rarely did a defendant who was represented by counsel plead guilty; on the contrary, virtually all such defendants pleaded not guilty and had a full trial. Only on a few occasions did I observe any sentence bargaining take place. In each of these cases, however, the defendant had freely admitted guilt before the commencement of bargaining. Thus, in these cases, the rights of the defendants were not compromised.

Although large amounts of plea and sentence bargaining were not observed, this study has found that there is significant

interaction between prosecution and defense actors. These contacts focus not on finding and disposition, but primarily on transfer of information from prosecution to defense and requests for continuances from both sides.

In addition, this analysis has gone beyond the existing studies and identified differences between the public defenders and assigned counsel. In brief, the two types of attorneys consistently differed in the activities which they performed at each stage of the proceedings, in the focus of their efforts, and in the roles which they played. The public defenders, at each point of the defense effort, typically sought more information, employed more sources, and more often took advantage of standard trial tactics than did assigned counsel. Furthermore, assigned counsel, for the most part, focused their efforts on obtaining a finding of not guilty for their clients, while the public defenders, on the other hand, not only sought positive findings for their clients, but, realizing the low success rate for this endeavor, also made a major effort to bring about favorable dispositions. In sum, the assigned counsel played the role of "defenders," while the more agressive public defenders behaved as "advocates." Factors which contributed to these dfiferences were the regularity of attorneys' interactions with the court, the group or individual nature of attorneys' practice, and personal goals of the attorneys.

II. Recommendations

The findings of this study, while preliminary, do lend

themselves to some policy-oriented interpretation, In particular, it can be stated that, by the indicators I have developed, one of the two models of defense investigated in this study seems to be clearly preferable to the other. The Massachusetts Defenders in the Boston Municipal Court and Dorchester District Court provide representation which, in every respect analyzed, appears more conducive to defendants' welfare than does that provided by the assigned counsel in the West Roxbury District Court. The indicators from which this judgment is derived make a number of assumptions. In particular, it is assumed that there is a positive relationship between completeness of attorneys' information about a case and the potential for an aggressive defense, that a full defense effort includes attempts to obtain a favorable disposition for the defendant, and that the greater the degree of attorney's involvement is at each stage of the defense process, the more effective the defense is likely to be. In short, I assume that "advocacy" is preferable to mere "defense," in that the client is likely to benefit more from it.

The findings also suggest that possible modifications of each basic model might offer further improvement. These recommendations, however, are merely suggestive of directions for reform. They were not tested and, in fact, cannot be tested without their implementation. Nonetheless, they are meaningful to consider:

(1) Increase the number of public defenders assigned to each court. More Defenders in each court would result in a

smaller caseload for each attorney. Smaller caseloads would allow individual Defenders to increase for each case the usage of the one commodity of which they invested less than private attorneys - time.

(2) Modify the assignment process in West Roxbury District Court (or any other court using the same method) in such a way that each attorney, rather than receiving his or her nine cases spread out over a twelve month period, would be assigned one client a week for nine weeks. This more frequent contact with the court could conceivably have the same positive effects as observed for the Massachusetts Defenders. [Alternatively, this could be achieved by lowering the number of attorneys on the court's list from approximately 150 to about 30. In this way, each attorney would receive about one case per week over the entire year.] In addition, due to the presence in court of each attorney for several consecutive weeks, it is likely that attorneys would be present when appointed to new cases, and, thus, could begin their services at time of arraignment.

(3) Require that the prosecutors (with appropriate safeguards) share the evidence against defendants with their attorneys. This provision would allow assigned counsel to obtain the same types of information now routinely gotten by public defenders, without the necessity of sacrificing any of their independence.

These recommendations, then, would be to provide attorneys for the indigent on a basis which would incorporate the best

elements of both present systems. In particular, the proposed changes would combine the benefits obtained from frequent interaction with the court system, especially the ease of acess to the information available from the infra-structure of the courts, with the assurance that attorneys would be assigned a manageable caseload. In this way, the intent of the Constitution and of such decisions as Gideon and Argersinger would seem to be accomplished.

BIBLIOGRAPHY

Advisory Commission on Intergovernmental Relations. State and Local Relations in the Criminal Justice System. Washington: United States Government Printing Office, 1971.

American Bar Association Project on Standards for Criminal Justice. The Prosecution Function and the Defense Function. New York: Institute of Judicial Administration, 1970.

Argersinger v. Hamlin. 407U.S.25(1972).

Betts v. Brady. 316U.S.455(1942).

Bing, Stephen R., and Rosenfeld, S. Stephen. The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston. Boston: Lawyers' Committee for Civil Rights Under Law, 1970.

Blumberg, Abraham S. Criminal Justice. Chicago: Quadrangle Books, 1970.

Blumberg, Abraham. "The Practice of Law as a Confidence Game," Law and Society Review, I, Number 2 (June, 1967), 15-39.

Blumberg, Abraham S. (ed.). The Scales of Justice. Transaction Books, 1970.

Buckle, Leonard Gould, and Buckle, Suzann Thomas. "Bargaining for Justice: Plea Bargaining as Reform in the Criminal Courts." Unpublished Doctoral dissertation, Department of Urban Studies and Planning, Massachusetts Institute of Technology, 1974.

Carlin, Jerome E., and Howard, Jan. "Legal Representation and Class Justice," UCLA Law Review, Volume 12:381 (1965), 381-437.

Frank, Jerome. Courts on Trial. Princeton: Princeton University Press, 1973.

Gideon v. Wainwright. 372U.S.355(1963).

Johnson v. Zerbst. 304U.S.458(1938).

Levenson, Judy. "The Right to Counsel." Unpublished Honors Thesis, Department of Political Science, Wellesley College, 1973.

Lewis, Anthony. Gideon's Trumpet. New York: Vantage Books, 1964.

Marks, F. Raymond, with Leswing, Kirk, and Fortinsky, Barbara A. The Lawyer, the Public, and Professional Responsibility. Chicago: American Bar Foundation, 1972.

Mayhew, Leon, and Reiss, Albert J., Jr. "The Social Organization of Legal Contacts," American Sociological Review, XXXIV, Number 3 (June, 1969), 309-318.

Mileski, Maureen. "Courtroom Encounters," Law and Society Review, V, Number 4 (May, 1971), 473-537.

Oaks, Dallin H., and Lehman, Warren. A Criminal Justice System and the Indigent. Chicago: University of Chicago Press, 1958.

Powell v. Alabama. 287U.S.45(1932).

Powers, Edwin. The Basic Structure of the Administration of Criminal Justice in Massachusetts. Boston: Massachusetts Correctional Association, 1973.

Skolnick, Jerome H. Justice Without Trial. New York: John Wiley and Sons, Inc., 1966.

Skolnick, Jerome H., and Schwartz, Richard D. (eds.). Society and the Legal Order. New York: Basic Books, Inc., 1970.

Sudnow, David. "Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office," Social Problems, XII, Number 3 (Winter, 1965), 255-276.